



The original of this book is in the Cornell University Library.

There are no known copyright restrictions in the United States on the use of the text.



STRAITS LAW REPORTS.

BEING .

A

_____0 ____

REPORT OF CASES

DECIDED

IN THE SUPREME COURT

O F

THE STRAITS SETTLEMENTS,

PENANG, SINGAPORE AND MALACCA:

ALSO

A FEW JUDGMENTS OF THE INDIAN AND ENGLISH CASES.

WITH AN ANALYTICAL INDEX

ву

STEPHEN LEICESTER,

Chief Clerk to the Magistrates of Police, Penang.

PRINTED AT THE Commercial Press, BY HEAP LEE & Co.
BEACH STREET, PENANG.

1877.

11/3282

KP6 18 A27 1877

PREFACE.

In sending forth this work before the public, the publisher deems it necessary to say a few words in regard to it.

It is an attempt in collecting, he thinks, for the first time on a large scale for public circulation the various judgments and decisions of the Supreme Court on questions of law affecting the mercantile community and others, as well as the native inhabitants of these Settlements.

The judgments in Reg. vs. Willans, Choa Cheow Neoh vs Spottiswoode, Ong Cheng Neo vs. Yeap Cheah Neo, The Municipal Commissioners vs. Tolson, Fatimah vs. Logan and the Appeal Cases, deserve notice.

In the Appeal Case of Yeap Cheah Neo vs. Ong Cheng Neo to the Privy Council, their Lordships referred to, and made a brief remark concerning the judgment of Choa Cheow Neoh vs. Spottiswoode, in affirming the decision of the presiding judge.

In 1807, Sir Edmund Stanley was appointed to establish the Recorder's Court in Penang, he arrived in the following year with the first Charter, and the Court was then established. In 1826, a second Charter was granted, by which Singapore and Malacca were annexed to Penang. Between 1850 and 1855, the trade and population of these Settlements had considerably increased and the business of the Courts could hardly be accomplished by one Recorder, the residents of Singapore petitioned the Home Government for a resident professional judge and their petition was favourably received. In January 1856, a third Charter was granted, Sir Richard McCausland was sent out to be Recorder of Singapore, and Sir Benson Maxwell of Penang.

THE TRANSFER of these Settlements to the Colonial Office took place on the 1st April 1867, the title of the respective Recorders was then changed, the one of Singapore styled Chief Justice of the Straits Settlements, and the one of Penang, Judge of Penang. Since the promotion of the last Judge of Penang to another Colony, that title has ceased. His successor is styled Judge.

A high Government Officer, a member of the Bar, has had the kindness to furnish the publisher with certain information regarding an Imperial Act and Ordinances, which are superseded or repealed by Ordinances subsequently passed; with this information and the list of unrepealed Ordinances prepared by him and of certain Indian Acts added thereto, will, he hopes in case of reference being required, prove useful. He is also greatly indebted to an Advocate of the Supreme Court for his manuscript copies of the unreported judgments.

He trusts the public will excuse any imperfections, but he feels assured from the support hitherto shown him in his previous work, they will overlook them.

S. L.

Penang, 1st December, 1877.



ERRATA.

Page	51	line	32	for	" oldt"	read	" old "
,,	63	,,	16	7.7	" condouct "	,,	" conduct "
**	66	**	23	,,	" The "	11	" This "
,,	109	,,	30	,,	" nott"	,,	" not "
,,	114	"	18	* * *	"i"	* *	"is"
,,	150	**	26	betw	een words ''any our'	٠,	" of "
**	4 58	,,	10	for	" di pertuan "	11	" de pertuan "
,,	461	,,	19	,,	" then "	,,	"than"
••	461	,,	28	"	" condsider "	* *	" consider "
**	463	**	4	,,	" domicils	,,	" domiciles"
,,	471	,,	5	,,	" apointment"	,,	"appointment"
33	481	,,	10	,,	" his "	,,	"her" 3rd word.
,,	606	9.7	12	,,	" XVII of 1868 "	**	"XVII of 1863"

ABBREVIATIONS SELECTED.

anr.	for	another.
c, Cap. or	ch. ,,	chapter.
cl.	,,	clause.
$Cr. \ L.$	••	Criminal Letters.
Cr. R.	,,	,, Rulings.
Gov. Gaz.	,,	Government Gazette.
Ind.	>,	India or Indian.
In re	1,	In the matter of.
$Law\ J.\ R$	ep. ,,	Law Journal Reports.
Mag.	11	Magistrate.
Max.	,,	' Maxwell.
Ord.	**	Ordinance.
01'5.	,,	others.
p.	,,	page.
par.	,,	paragraph.
P. C.	,,	Penal Code or Privy Council.
Prac.	,,	Practice.
Pro. & Me	at. ,,	Probate & Matrimonial.
Q.	,,	Queen.
$oldsymbol{Reg.}$,,	Regina.
s., ss. or se	ecs. ,,	Section or Sections.
v. or vs.	,,	Versus.
Vic. or Vi		Victoria.
1 W. R.	* *	1st Vol., Weekly Reporter.
3rd Ed.	• •	3rd Edition.

mossochen
autilie Clerk
Penang,

ANNO VICESIMO NONO & TRICESIMO

VICTORIÆ REGINÆ.

CAP. CXV.

An Act to provide for the Government of the "Straits Settlements." [10th August, 1866.]

WHEREAS the Islands and Territories, known as the "Straits Settlements," namely, Prince of Wales' Island, the Island of Singapore, and the Town and Fort of Malacca, and their Dependencies. were heretofore Part of the Territories in the Possession and under the Government of the East India Company, and became vested in Her Majesty as a Part of India by virtue and subject to the Provisions of the Act of the Twenty-first and Twenty-second Year of Her Majesty, Chapter One hundred and six, intituled An Act for the better Government of India: And whereas it is expedient that the said Settlements and their Dependencies should cease to form Part of India, and should be placed under the Government of Her Majesty as Part of the Colonial Possessions of the Crown: And whereas it may be hereafter expedient to include the Colony of Labuan within the Government of the said Settlements: Be it enacted by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual aud Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:-

1. It shall be lawful for Her Majesty, by Order to be by Her made with the Advice of Her Privy Council, to

Straits Settlements
shall cease to be Part dof India.

declare that this Act shall come into operation at a Time to be specified in such Order in Council,

and at such Time the said Settlements shall cease to be Part of India for the Purposes and within the Meaning of the aforesaid Act, and it shall be further lawful for Her Majesty by any such Order to make Provision respecting the Enforcement by or against the Government of the said Settlements of all or any of such Debts, Claims, and Obligations as might if this Act had not passed, have been enforced by or against the Government of India in connexion with the Administration of the said Settlements,

2. From and after the coming into operation of this Act, it shall be lawful for Her Majesty, by Order or Orders to be by Her from Time to Time made, with the Advice of Her said Privy Council, to establish all such Laws, Institutions, and Ordin-

ances, and to constitute such Courts and Officers, and to make such Provisions and Regulations for the Proceedings in such Courts, and for the Administration of Justice, and for the raising and Expenditure of the Public Revenue, as may be deemed advisable for the Peace, Order, and good Government of Her Majesty's Subjects and others within the said Settlements, or within any Territory which may at any Time be Part of or dependent upon the same, any Law, Statute, or Usage to the contrary in anywise notwithstanding.

3. It shall be lawful for Her Majesty, from Time to Time, by any Letters Patent under the Great Seal of the United Kingdom, or by any Instructions under Her Majesty's Signet and Sign Manual accompanying and referred to in any such Letters Patent, to delegate to any Three or more

Persons within the said Settlements, or within any Part or Dependency thereof, the Powers and Authorities so vested in Her Majesty in Council as aforesaid, either in whole or in part, and upon, under, and subject to all such Conditions, Provisoes, and Limitations as by any such Letters Patent or Instructions as aforesaid Her Majesty shall see fit to prescribe, and subject as aforesaid, to empower such Three or more Persons to exercise in respect to the Island of Labuan and its Dependencies all or any of the Powers and Authorities herein-before vested in Her

Majesty in respect to the said Settlements: Provided always, that, notwithstanding any such Delegation or Grant of Authority as aforesaid, it shall still be competent to Her Majesty in Council in manner aforesaid to exercise all the Powers and Authorities, either by virtue of this Act or otherwise, vested in Her Majesty in Council.

4. Until otherwise provided by Her Majesty in Council, or by such Three or more Persons as aforesaid, all Laws or Regulations (except the aforesaid Act of Parliament) which, when this Act shall come into operation, shall be in force in the said Settlements and their Dependencies, and all Proceedings of any Court of Justice had or to be had therein, shall be and continue to be of the same Force and Effect, and all Judicial and other Officers who, when this Act shall come into operation, shall be lawfully exercising their Offices in the said Settlements and their Dependencies, shall continue to have and exercise the same Functions and Authorities therein, as if this Act had not been passed.

Government Gazette, 22nd March, 1867. Notification.

Consequent upon the following Order of the Queen in Council published for general information, His Excellency Colonel Harry St. George Ord, C. B., having been appointed Governor, will assume the Administration of the

Straits Settlements on the 1st April.

(Sd.) R. MACPHERSON, Lieut.-Colonel, R. A.,

Singapore, 22nd March, 1867. Resident Councillor and Secretary to Government, Straits Settlements.

STRAITS SETTLEMENTS.

(Prince of Wales' Island, Singapore and Malacca.)

Order of the Queen in Council for Bringing into Operation the Act 29 and 30 Victoria, cap. 115, intituled "An Act to Provide for the Government of the "Straits Settlements."

At the Court at Osborne House, Isle of Wight, the 28th day of December, 1866.

Dated 28th December, 1866.

Present.

THE QUEEN'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT.
VISCOUNT CRANBORNE.
SIR JOHN PAKINGTON, BART.
LORD CHIEF JUSTICE OF THE COMMON PLEAS.
MR. SEYMOUR FITZ-GERALD.

Whereas by an Act of the Twenty-ninth and Thirtieth Year of Her Majesty, Chapter One hundred and fifteen, intituled "An Act to Provide for the Government of the Straits Settlements," after reciting that the Islands and Territories known as the "Straits Settlements," namely, Prince of Wales Island, the Island of Singapore, and the Town and Fort of Malacca and their Dependencies, had become vested in Her Majesty as a Part of India, by virtue and subject to the Provisions of the Act of the Twenty-first and Twenty-second Year of Her Majesty, Chapter One hundred and six, intituled "An Act for the better Government of India;" and that it was expedient that the said Settlements and their Dependencies should cease to form a Part of India, and should be placed under the Government of Her Majesty as Part of the Colonial Possessions of the Crown, it was Enacted that it should be lawful for Her Majesty, by Order to be made by Her Majesty with the Advice of Her Privy Council, to Declare that the said First mentioned Act should Come into Operation at a time to be specified in such Order in Council, and that at such time the said Settlements should Cease to be Part of India, for the Purposes and within the Meaning of the said Act for the better Government of India, and it should be lawful for Her Majesty to exercise in respect to the said Settlements the Powers set forth in the said First mentioned Act.

And Whereas it is expedient to Bring into Operation the said First mentioned Act.

It is Hereby Ordered by Her Majesty, by and with the Advice of Her Privy Council, that on the First day of April, 1867, the said Act to Provide for the Government of the Straits Settlements shall Come into Operation.

(Signed) EDMUND HARRISON.

JUDGES.					
1st Judge and Magistrate of Frince of Wales' Island	•				
John Dickens Esq. (a,)	1800-1805.				
Recorder of Prince of Wales' Island.					
Sir Edmund Stanley, Knt. (b.)	1808-1816.				
Sir Edmund Stanley, Knt. (b.)	1816-1817.				
,, Ralph Rice, ,, (c.)	1817-1823. 1823-1824.				
., Francis S. Bailey, ,,	1020-1024,				
Recorders of P. W. Island, Singapore and Malacca.					
O' T1	1826-1829.				
Sir John T. Claridge, Knt	1829-1835.				
, Benjamin H. Malkin. ,, (d.)	1835-1836.				
,, William Norris, ,,	1836-1847.				
,, Christopher Rawlinson, (b.)	1847-1850. 1850-1855.				
,, William Jeffcott, ,, 3rd Charter, 1855.	1000-1000.				
Recorders of Singapore and Malacca.					
0' D' 1 1 D 35 0 1 1 77 /	1856-1866.				
, P. Benson Maxwell,	1866-1867.				
Recorders of P. W. Island.					
Sir P. Benson Maxwell, Knt	1856-1866.				
,, William Hackett, - ,,	1866-1867.				
THE TRANSFER,					
	nt.				
From the Indian to the Colonial Government	nt.				
From the Indian to the Colonial Government The Colonial Charter, 1867.	nt.				
From the Indian to the Colonial Government THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements.					
From the Indian to the Colonial Government THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements.					
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31	1867-1872. 1872				
From the Indian to the Colonial Government The Colonial Charter, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31	1867-1872. 1872				
From the Indian to the Colonial Government The Colonial Charter, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Theodore T. Ford,, 1st Jan 18 Judges of Penang.	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Theodore T. Ford,, 1st Jan 18 Judges of Penang. His Honor Sir William Hackett, Knt. (e.) Theodore T. Ford, Acting from 17th July/74 to 31	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Theodore T. Ford,, 1st Jan 18 Judges of Penang. His Honor Sir William Hackett, Knt. (e.)	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Theodore T. Ford,, 1st Jan 18 Judges of Penang. His Honor Sir William Hackett, Knt. (e.) Theodore T. Ford, Acting from 17th July/74 to 31	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Judges of Penang. His Honor Sir William Hackett, Knt. (e.) Theodore T. Ford, Acting from 17th July/74 to 1 Geo. Phillippo, 1st Apl/76 Puisne Judges. Justice Geo. Phillippo, 16th Feb. 1874 to 31	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Judges of Penang. His Honor Sir William Hackett, Knt. (e.) Theodore T. Ford, Acting from 17th July/74 to 1 Geo. Phillippo, 1st Apl/76 Puisne Judges. Justice Geo. Phillippo, 16th Feb. 1874 to 31	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Judges of Penang. His Honor Sir William Hackett, Knt. (e.) Theodore T. Ford, Acting from 17th July/74 to Puisne Judges. Justice Geo. Phillippo, 16th Feb. 1874 to 31 Theodore T. Ford, 15th Apl. , , 300 R. C. Woods, Snr. (f.) Atg 11th Dec 100	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Judges of Penang. His Honor Sir William Hackett, Knt. (e.) Theodore T. Ford, Acting from 17th July/74 to 31 Theodore T. Ford, 15th Apl 30 R. C. Woods, Snr. (f.) Atg 11th Dec 10, 30 Jonas D. Vaughan, (f.) 12th Mch. 1875, 13. Theodore T. Ford 19th Dec. 1876	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Judges of Penang. His Honor Sir William Hackett, Knt. (e.) Theodore T. Ford, Acting from 17th July/74 to 31 Theodore T. Ford, 15th Apl 30 R. C. Woods, Snr. (f.) Atg 11th Dec 10, 30 Jonas D. Vaughan, (f.) 12th Mch. 1875, 13. Theodore T. Ford 19th Dec. 1876	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31 Judges of Penang. His Honor Sir William Hackett, Knt. (e.) Theodore T. Ford, Acting from 17th July/74 to Puisne Judges. Justice Geo. Phillippo 16th Feb. 1874 to 31 Theodore T. Ford, 15th Apl 30 R. C. Woods, Snr. (f.) Atg 11th Dec 10 Jonas D. Vaughan, (f) 12th Mch. 1875 13 Theodore T. Ford 19th Dec. 1876	1867-1872. 1872				
THE COLONIAL CHARTER, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt Thomas Sidgreaves, Geo. Phillippo Acting from 21st to 31, Judges of Penang. His Honor Sir William Hackett, Knt. (e.) Theodore T. Ford, Acting from 17th July/74 to Geo. Phillippo, 1st Apl/76 Puisne Judges. Justice Geo. Phillippo, 16th Feb. 1874 to 31, R. C. Woods, Snr. (f.) Atg 11th Dec, 10th Jonas D. Vaughan, (f) 12th Mch. 1875, 13th Theodore T. Ford 19th Dec. 1876, Henry L. Phillips, C. M. G 30th June 1877, 9th Thomas Lett Wood 10th Sept (a.) A Barrister of the Calcutta Supreme Court—powers limited. Salary \$ 964-7.	1867-1872. 1872				
The Colonial Government The Colonial Government The Colonial Charter, 1867. Chief Justices of the Straits Settlements. His Honor Sir P. Benson Maxwell, Knt	1867-1872. 1872				

⁽e.) Afterwards appointed to be Chief Justice of Ceylon. (f.) Barristers of the Local Bar.

Extract from Lord Campbell's work on the life of Lord Bacon.

While Lord Bacon was Chancellor he regularly twice a year before the commencement of each of the two circuits—assembled all the Judges and all the Justices of Peace that happened to be in London in the Exchequer Chamber, and lectured them upon their duties-above all admonishing them to uphold the prerogative "the twelve Judges of the realm being the twelve lions under Solomon's throne, stoutly to bear it up, and Judges going circuit being like planets, revolving round the Sovereign as their sun." He warned them against hunting for popularity, saying, "A popular Judge is a deformed thing, and plaudites are fitter for players than magistrates." The Justices he roundly threatened with dismissal if they did not effectually repress faction, "of which ensue infinite inconveniences and perturbations of all good order, and crossing of all good service in court and country." And he told them he should follow a fine remedy devised by Cicero when consul, a mild one but an apt one: Eos qui otium verturbant reddam otiogos.

In swearing in new Judges, he delivered most excellent advice to them. Thus he counsels Justice Hutton, when called to be a Judge of the Common Pleas:—

"Draw your learning out of your books, not out of your brain."

"Mix well the freedom of your own opinion with the reverence of the opinion of your fellows."

"Continue the studying of your books, and do not spend on upon the old stock."

I SLOCK.

"Fear no man's face, yet turn not stoutness into bravery."

- "Be a light to jurors to open their eyes, not a guide to lead them by the noses."
- "Affect not the opinion of pregnancy and expedition by an impatient and catching hearing of the counsellors at the bar."
- "Let your speech be with gravity, as one of the sages of the law, and not "talkative, nor with impertinent flying out to show learning.*"
- "Contain the jurisdiction of your Court within the ancient mere-stones, without removing the mark."

^{* &}quot;An overspeaking Judge is no well-timed cymbal. It is no grace to a Judge first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent (anticipate) information by questions, though pertinent."—Essay of Judicature.

19TH NOVEMBER 1827.

SIR JOHN THOMAS CLARIDGE'S

Charge to the Grand Jury on opening the first Session of Oyer and Terminer of the Court of Judicature of Prince of Wales' Island Singapore and Malacca.

Gentlemen of the Grand Jury of Prince of Wales' Island,

Singapore and Malacca!

I regret, that I am unable on the occasion of our first meeting, to congratulate you on the lightness of the Calender; which presents a List of crimes, and offenders, that must, I fear, detain you from your other avocations, a considerable time.

But it must be remembered, that many months have elapsed since the last Session of Oyer and Terminer was holden in this Island; and many offences will be brought under your notice

that have hitherto been disposed of elsewhere.

With such a Calender before you, it is not my purpose to fatigue your attention with many remarks on our Charter; which has been obtained on the petition of the East India Company; to whom, on that account, as well as to the Royal benevolence, the thanks of the inhabitants of the united Settlement are justly due. Its provisions are nearly the same as those contained in that which has just expired, and they are perfectly familiar to all of you.

I am induced, however, (by the importance of the subject, on the perusal of a passage, in our Island paper together with some Comments, by the Editor as I suppose, thereon) to make a few remarks on the mode of proceeding in Civil Cases.

(Here his Lordship read from the Pinang Register and Miscellany of the 14th Instant, the Editor's observations upon and an Extract therein given of a Letter from Mr. Brougham on on the subject of Going to Law.)†

[†] We earnestly recommend to the perusal of our readers, whether in any way applicable to themselves or to their acquaintance, who may be in the habit of resorting too readily to Law proceedings, an Extract that will be found in our following columns, of a Letter from that eminent Statesman and Lawyer Mr. Brougham, upon the subject of Going to Law. From some years personal observation, we are inclined to believe, that no community under the Sun would the appointment suggested by Mr. Brougham be more beneficial than to that of this Settlement; in which, whether from false impressions of right founded in ignorance and unchecked or encouraged by the counsel of interested

Whether such a tribunal would answer the end proposed I need not stop to inquire, but with the observations of the Editor, as applicable to this place, I entirely concur.

Many of the cases which I have decided in the course of the last fortnight, ought never to have come into Court at all; and I could have accomplished in five minutes that which has occupied mine, or rather, the public time for hours, if the mode of proceeding pointed out by the old and present Charter had been properly followed.

or half informed advisers, or from whatever other reason, there is little doubt but that, comparatively, more groundless Causes have been brought into our Court than into that of any other Settlement in India; not only to the annoyance of Individuals, who are compelled to waste their time in appearing to answer such vexatious calls, but to the greater annoyance and the loss of the more valuable time of the Court, whose patience must be subjected to the severest trial, in being obliged to sit and hear a long and tedious course of interpreted evidence, which in the end, turns out to be totally unnecessary, or to establish a point that could have been easily determined by any uninterested person of common converse with the every day business of the world.

It would be further beneficial in checking that tendency to corruption which is much too prevalent and considered no crime among the Native population; who are very apt to believe, from the rlight grounds on which they are advised to go to Law, that trick and chicanery sufficient for their own purpose

may be purchased at some price.

Penang Register and Miscellany 14th November 1827.

Going to Law, -Mr. Brougham in a letter on the subject, says, "If, in the earliest stage of a cause, there were a posibility of bringing the parties themselves before a Judge or officer of respectability, who might hear them state their mutual contentions, and the grounds of them, might question them, and confer with them upon the whole matter, and give them his impression of the case, my firm belief in that much more than onehalf the causes thus begun never would proceed one step farther; and that a still greater proportion of the causes now tried would be abandoned or settled before they came into Court. The appointment of such arbitrators by public authority might have the most beneficial effects, even, if, at least, it were not made compulsory to go before them; for surely many parties would be found not so entirely in the hands of these law agents as to prefer the course beneficial only to the profession " Something like what Mr. Brougham suggests has long been practised in Denmark. Parties, before entering on litigation, appear in what are called Court of Reconciliation, and hear the opinion of the Judges of the case, and if they choose to abide by the suggestion of the Judge, a decree is entered; if not, they try their success at law.

[Hamp. Telgph, 28th May.]

Reverting to the Paragraph to which I have alluded, you may be surprised to hear, that a tribunal similar, certainly, in spirit, if not in exact resemblance, exists at this moment in the Settlement, and has done so in this Island, ever since it had a Charter.

You know that in this Court all the Powers of all the Courts of Westminster Hall are consolidated; you know that this Court is also one of Ecclesiastical Jurisdiction; you know that the mode of proceeding pointed out by the Charter in page 28 of the printed copies is as follows.

"That upon any Cause of Action or Suit supposed to have arisen and to be cognizable by the said Court in any of its Jurisdictions herein-mentioned upon any Occasion where the Aid of the said Court shall be required, it shall be lawful and competent for any Person whomsoever, by himself or herself, or his or her lawful Attorney, or his Friend or Agent to prefer. verbally or in Writing to the said Court of Judicature of Prince of Wales Island, Singapore and Malacca, or to any of the Judges or the Registrar thereof, his or her Complaint, and thereupon the Recorder of the said Court of Judicature of Prince of Wales. Island. Singapore and Malacca, or the Registrar of the said Court, or the Clerk of such Registrar, by his Direction, shall reduce the Substance of the said Complaint, if verbal, into Writing: or if it shall be preferred in Writing, he shall divest it of all extraneous Matter, and set down the Substance thereof in a Writing to be drawn up, if it shall require to be re-drawn; and such Complaint shall be in, or shall be reduced into the Form of a Petition to the said Court stating shortly the Substance of the Matter complained of, or touching which the Aid of the Court is required, and praying that Justice may be done, as the case shall require, and such Petition shall be filed of Record in the said Court."

Suppose a person to present himself before the Court, and state his ground of complaint while the three judges are sitting: pr suppose him to go to any one of the three judges individually. Upon hearing, or reading his complaint, the judge or two of them would refer him probably to the Recorder, or Registrar, and I should wish to know, whether the Recorder, or even a Clerk could be said to transgress the bounds of 'duty, by telling him, that, provided he proved his statement to the full, he must necessarily fail in a Court of Justice. If a man is fool enough to go into Court, after such an admonition, he ought to be made to pay for his own obstinacy, and for the trouble given

by him to the other party. If he is wise enough to take the advice offered to him, no harm has been done, and no trouble given to others. There are and always must be many cases which cannot be thus disposed of; such cases are the proper subject for the decision of a Court of Justice and the parties are fully warranted in referring them, where the Law is uncertain, to the Tribunals of the Country.

It is my duty to tell you, that every person who has a cause of complaint, for which he asks redress in this Court, may get his petition drawn wherever he pleases; but I recommend, every person so circumstanced, to apply to the Registrar, in the first instance, who will hear his complaint, draw his Petition, and if necessary, introduce him to the Recorder.

By these means he will learn, whether he has a fair ground of success or not, and the extortion, which has been practised in this Town upon the more ignorant classes of the Population will be prevented.

By the liberality of the E. I. Company, a monthly sum has been placed at the disposal of the Court, which will enable it to secure an efficient Establishment of proper Clerks. These persons are instructed when drawing Petitions to state the substance of the complaint, in the manner pointed out by the Charter, so that a Defendant, may know what he is really called upon to answer. They are instructed moreover to adopt the same course in framing Pleas and Answers; so that each party will know his adversaries case, and the presiding judge be enabled to ascertain the point which awaits his decision. To give you a familiar instance. Suppose an Action brought on a Promissory note: here, proof is to be given, of the signing of the maker, if the Defendant simply denies that it is his Note; But suppose an Action brought on a Note for a Thousand Dollars, and the Defendent to admit the Note to be of his making, but says "I have delivered to you goods to the value of a Thousand Dollars, or less; Now in such a case the question is whether he has delivered goods to that amount, or not. If he has, the Plaintiff will fail, and must pay Costs. If he cannot prove his full set off, as it is called, he must pay the difference, and Costs into the bargain; Common sense it is hoped will teach parties not to litigate in cases like this. But whatever may be the propensity to litigation among the Inhabitants of this settlement, a steady adherence to the mode of proceeding which I now recommend. will contribute effectually to check it. To prove to you that such propensity does exist, the following instance out of many must

at present be sufficient. A man brought an Action in the Court of Requests in which he was non-suited. He appealed against the decision of the Court below, and for lodging his Appeal he paid three Dollars; he was not present when his Appeal was called on, and his Cause was consequently struck out of the Paper. He paid 75 pice to a person in the Town, for drawing his Petition to have it restored, and he actually paid four more Dollars to this Court for Subpænas and costs, and by his own Petition, brought in by himself, it appeared the sum in dispute was thirty five Pice.

I do not wish by what I have just now said to discourage the employment of proper Agents, but as far as I am able, I will prevent the admission into this Court of persons who are unable to do their Clients that justice which every one has a right to expect from professed advocates.

With respect to Executors and Administrators, you will observe that very extensive powers are entrusted to the Court; very beneficial to the inhabitants of this Settlement provided they are duly and regularly exerted, and likely to produce much public and private inconvenience, if neglected. In cases which fall within the provisions of the Charter, the Court is resolved to adhere strictly, to its duties as therein prescribed: A person therefore after application for letters of Administration, will be required to make and exhibit to the Court an Inventory of the Goods of the deceased, according to the Condition of his Bond; and afterwards to give a true account of his Administration; and Executors will be called upon to pass their Accounts from time to time, until the Effects of the deceased shall be fully administered.

The course of Administration, is, I presume known to and understood by all. The debts are first to be paid in regular order, and then the provisions of the Will carried into execution,—or where there is no Will, the Effects distributed among the next of kin, according to the Laws and Customs of the Native Inhabitants.

But administration may occupy a considerable time; there may be debts owing in various distant places, and the parties beneficially entitled after payment of those debts, may reside permanently, or temporarily, in other Countries.

It is thus, a matter of great convenience to an Executor, or Administrator, to have a secure place of deposit at hand, for such funds and property, as may have come into his possession; such a place of deposit exists in this Settlement, namely, the Treasury of the East India Company; for no other reasons I believe, than

to preserve this property in a place of security, was the clause relating to deposits in the Company's Treasury, inserted in the late Charter; and the same remarks will apply to the corresponding clause in the present.

It is of the greatest consequence to the Inhabitants of this Settlement to know, that such a place of security exists; and to know also that there is a Court which is able to protect the children and property of those who have been searched away without warning and who may have left their affairs in confusion and

family unprotected.

The Court is also authorized by the present Charter to hold General and Quarter Sessions, for the particular purposes therein specified; and it is particularly, ordained, that the Court shall have power at their General or Quarter Sessions, by themselves, without any inquest or Jury to inquire of, hear and determine, all breaches of the peace, quarrels, controversies, and other crimes, and misdemeanors whatsoever, other than and except Treason and Felony, and to cause the necessary witnesses to be summoned to give evidence, upon oath, and to award and cause such punishment to be inflicted on such persons who shall be found guilty by them, of any such Offences, so as such punishment shall not extend to life or limb, or perpetual imprisonment, or banishment, or transportation, from the settlement, and so as such punishment shall not be repugnant to the religious customs or manners of the person on whom it is to be inflicted. And the Court is authorized to proceed to the trial and punishment of such offenders as last aforesaid, in such summary way.

I have been more careful to direct your attention to this part of the Charter, because, the practice obtained in this island, until lately, for a single Magistrate, sitting at the Police Office, to flog, fine, and imprison Offenders at discretion. This practice has been all along, and is illegal; Having said thus much, I trust, that I shall not again have occasion to notice it from this Bench. But let not servants, and others who may be guilty of offences falling short of felony, think, that they will escape punishment with impunity. The Sessions have power, as I have just remarked, to try not only offences short of felony, but even quarrels, and controversies, and to inflict summary punishment in a summary way.

In the present state of Society in this island, it is absolutely necessary that such a power should be lodged somewhere; and for the future, the Court of Quarter Sessions will hold Sittings for the trial and punishment of offences of this nature; and the same

good which was effected by the late practice at the Polico Office, will, it is hoped, be obtained in the Court of Quarter Sessions by proceedings altogether legal and authorized by the Charter.

The Charter authorizes the Court at their General and Quarter Sessions, from time to time to nominate and appoint such persons as the said Court shall see fit, to be and act as the Constables, or to perform the duties usually performed by Constables and subordinate peace officers in that part of the United Kingdom called England, as nearly as the different Religions, Customs and Manners of the different inhabitants of the said Settlement and places shall require or will admit.

The Charter also authorizes and empowers the said Court to compel all and every such persons to serve the said offices to which they shall be appointed, in the like manner as persons may be compelled to serve the office of Constable within that part of the United Kingdom colled England, so far as the Religious, Customs

and Manuers of such persons will admit.

At the last Sessions of Oyer and Terminer and Gaol Delivery, a Presentment was made by the Grand Jury of the inefficiency of the Police of the island; this Presentment was forwarded to the Governor in Council, who immediately or level an ample Establishment of Officers and Poons to be placed under the Superintendent of Folice and to be stationed in proper places; and an invitation was given to the inhabitants to come forward and assist in preserving the property of the island, by acting as Constables.

With a single, and to himself, a most honorable exception of Mr. Brown of Glugore, not an individual volunteered. I regret that I am obliged to notice this want of public spirit; and I regret that I am obliged from this Bench, to state the determination of the Court, to punish with severity all those, who having been called on to take upon themselves in rotation, the duries of peace officers shall refuse to take the necessary oath, and act accordingly. With what propriety can the Government be called upon, to contribute funds for the preservation of order unless the inhabitants, to protect whose interests the police is established, will lend their aid in carrying these objects into effect.

With respect to the Police itself, inquiries have been made by the direction of the Court, of the Superientendent of Police, of the number of Constables and subordinate Peace Officers curployed on the Establishment, and whether the Establishment of the Superintendent of Police is complete, and whether the Office is supplied with efficient Clerks—Whether many robberies have been committed, the perpetrators of which have not been discovered— Whether there is an efficient Marine Police—Whether there is a Police Establishment in the Opposite Coast—Whether there is a Night Parole on the Opposite Coast and on this island—Whether in his opinion, the Establishment on this island, and on the Opposite Coast, is sufficient to protect the persons and property of the inhabitants.

It appears by the letters which I shall place in your hands that some change has taken place in the interval between the dates of the two first namely, the 18 h and 14th of August, and the dates of the two last, vize the 31st of October, in the office of the Sitting Magistrate, and that a reduction has also taken place in the Police Establishment, both in number and wages; "the present strength" says Mr. Causter, "I do not think sufficient for the Town but in the Country, the Establishment in y perhaps suffice."

What this change is in the Sitting Magistrate's office I am not able to inform you; but if the Department of Superientendent of Police is still united to that of the Magistrate, I think that confusion and inconvenience might ensay. The duties of the two are quite opposed. The Police is established for the purpose of preventing crime by its vigil ence, and detecting the perpetrators when coince are committed. The Magistrate sits for the purpose of committing to Gool, those who have been brought before him by the Police, that they may be put on their trial before a jury in due season. One department requires, a number of active officers, to range the country, or remain stationary in proper places, to act when called upon by those whose persons and property have received injury—The other requires the attendance of a vigilant and sagacious Magistrate, and an adequate number of Clerks and Interpreters.

We find that the united Establishment of the Sitting Magistrate and the Superintendent of Police, has been greatly deficient. We find the number of constables and other subordinate officers, has been of late amply sufficient for the protection of the people. We find that there is no Marine Police, and that the Police on the opposite shore is under a Provincial Superintendent, and that the number of Officers on the establishment is not known.

We have been favoured with the opinion of the Sitting Magistrate respecting the number of Clerks, Interpreters, and other officers necessary to conduct the business of that department, and you are acquainted with the opinions of the Superintendent of Police, from what I have just tead to you.

We have received the united opinion of the Sitting Magistrate and the Superintendent of Police, as to the necessity of dividing these two offices; I therefore recommend you, the Grand Jury, to present, that these two offices should be divided—that a proper place

should be set apart for the Sitting Magistrate, with the number of Clerks, Interpreters and other officers recommended by him.

We recommend that a full Establishment of Constables, Jemedars and Peops should be continued under the inspection of the Superintendent of Police—that the Superintendent himself, should be always a Magistrate, and have the Establishment allowed to him, by Government, recommended in his Report.

That a Marine Police be established, and placed under the Superintendent of Police—and that the establishment of Police on the opposite shore be continued under the superintendence of a

proper controlling authority.

Having said thus much respecting the Charter, it is my duty to address you on the particular matters which are now given you in charge. You are aware that the Grand Jury is returned by the Sheriff to enquire, present, do, and execute all those things which on the part of the King shall be commanded them. It usually composed of gentlemen of the best figure in the county, and the same rule is observed in the selection, not only in England, but in India, and Colonies of the English Crown, where trial by Jury has obtained. You who are now assembled, in the discharge of their solomn duties, cannot estimate their importance too highly, or bestow too much attention in weighing the terms of the oath under which you act. You swear, first of all diligently to enquire, and make true presentment of all such things as shall be given you in charge. Now it is unquestionably the of the Judge, to direct your attention to such as in his discretion require your interference! but you are not to consider yourselves restriced to such matters on'v, as might, perhaps be inferred from the words of your oath. You certainly have a right, and are expected, to present to the Court such public unisances, and offences, and offenders, as may have come under your immediate notice; this you are to do faithfully, presenting no one from envy, hatred, or malice, and leaving no one unpresented from fear, favour, or affection,

With respect to the more immediate duties of a Grand Jury, namely, the finding or ignoring Bills of Indictment, you are aware that the mode of preferring Indictments is to have the several Witnesses sworn in Court, and it is then forwarded to the Grand Jury with the names on the back.

It is the province of the Grand Jury to hear Evidence on one side only, and only to enquire whether there be sufficient cause to call on a party to answer, not to say absolutely whether Guilty or not Guilty for that is the especial duty of a Petit Jury.

Now it is sufficient, where many names are on the Indictment, to examine one witness only, if his evidence can prove the fact, as in a Burglary; if one witness swear his house was broken in the night, that property therein was stolen and that the persons named in the Indictment did it, there is quite sufficient evidence of Burglary to find a true Bill against them.

But it is not sufficient, in order to throw out a Bill, to examine one or a few of the witnesses only. Suppose a Grand Jury to have the depositions before them and the names of the witnesses on the back of the Bill to exceed in number those in the Depositions, it by no means follows that the evidence given before the Justice is all the evidence that can be had. All that is required before the Justice, is evidence sufficient for him to commit on; but it does not follow that evidence which will warrant a Justice to comu it, will warrant a Grand Jury in finding a true Bill. It is therefore necessary for a Grand Jury to take the witnesses one by one and if they are satisfied, to find the Bill true, on the evidence of one or more; but not to reject it up til they have heard the evidence of all.

His Lordship then directed the attention of the Grand Jury to the insalubrity of the Island arising from the state of the roads particularly one spot near Pulo Tekus, which had been nearly impassable for six weeks; and referring to the Gaol, he told them that they might of course, visit it if they wished, but that he had reason to know that Government contemplated the building of a new Gaol nearer the Town. He told them also, that no Military Officer had any right to visit the interior of the Gaol without the permission of the Sheriff, but no Sheriff, would ever hesitate to grant such permission on a proper application.

His Lord-hip communed and said that he did not think it necessary to direct the attention of the Grand Jury to any of the cases which would be brought before them, with the exception of a few which he pointed out. There were many cases of Burglary, many of receiving stolen goods. They had acted so often in the honerable capacity in which they were placed, though with a more confined jurisdiction, that they must know what was necessary to establish in Law crimes of the nature he mentioned, and then dismissed them.

Before the Hon. Sir Benjamin Malkin,—Recorder.

WARNE C. GAUDART.

(The Court of Requests has jurisdiction to try a case where the

amount claimed is within its jurisdiction, although such amount be the balance of an amount of greater extent, whatever may have been the cause of reducing such amount, such as the Statute of Limitations, infancy, or payment, &c. provided it be not by set off or tender. The words "matter in dispute" in the Charter and Proclamations relating to the Court of Requests, mean the thing claimed and denied, and not any thing which may come incidentally in question; and has no application at all to the "debts" which come in question, but applies only to the unspecified class of cases of small amount to which the power of the Court extends.)

This was an application arising out of an action in the Court of Commissioners for the recovery of small debts in which the Commissioner had nonsuited, considering the subject matter of the action to exceed the limitation of the authority of that Court. The action is represented to have been for a balance of account, the sum sought to be recovered being within the authority of the Court but being the balance of an account of greater extent and in which some of the items individually exceed the limited sum. There appears to have been no regular statement and adjustment of an account, so as to furnish a completely new cause of action on an account stated, in which case no doubt seems to have been entertained that the power of the Court would apply; but it is said, on the part of the complainant, that he could have produced evidence to show some acknowledgment of a balance and that evidence was not received.

If it were necessary to examine migutely into what took place on the hearing, more information would underheadly be requir, ed, and a more regular manner of pro-ceding ought to be adopted, before this Court can make any Linding order up a the Commissioner of the Court below; but as it app are that us'y that the on'y proper course of proceeding if the Commissioner made error in adjudicating on the case, but had marely relyed to hear it on a mistaken notion that he was not stup wered to do so, would be to remit it to him for hearing, the most convenient course for me to adopt will be to express me opinion as to the jurisdiction of the inferior Court, and that the case should be taken back there by the consent of the parties, if, on hearing that opinion the plaintiff should think it desirable to do so. It will be seen by my giving the plaintiff that power of choice that I think he is, at all events, entitled to some further investigation, but it will be a question for him whether he will desire it, because it is possible that upon the investigation the Commissioner might finally come to his original conclusion that the case is beyond his authority. Whether he ought to do so or not depends entirely on circumstances with respect to which I am completely uninformed.

The general question involved in the case is one of great importance as it affects the general practice of the inferior Court, and it is undoubtedly one of much difficulty as similar questions have very frequently come before the Courts in England and have occasioned a series of very inconsistent and conflicting decisions. Court of Requests Acts in England generally contain provisions mulcting parties in costs who bring actions in the superior Courts which might and ought to have been brought in those of lower jurisdiction, and except in a particular and very questionable class of cases where the Judges have claimed a discretionary power of refusing to give or take away costs in cases which in the result, might have been tried in the inferior Court but the plaintiffs did not appear to have acted vexatiously in choosing to proceed in the uperior. The decisions as to liability to costs are substantially decisions on the jurisdiction of the inferior Courts. In the Court of King's Bench those decisions have been generally in favour of that juri-diction, in the Court of Common Pleas against it. I am not aware of any in the Court of Exchequer. such a conflict of authority it is of course necessary to examine into the principles on which the decisions are founded, although if the questions were to depend on anthority merely I should say that, with reference to the particular times at which those questions were decided and to certain inaccuracies of argument which, without entering into any minute detail, impeach the authority of some of the C. P. cases, I should consider the authority of those decided in K. B. as more binding.

The general principle on which the King's Bench seems to have acted is this, that the object of the institution of those inferior Courts is to give a cheap and easy remedy for all claims of trivial amount, except in certain cases where, by the express provisions of the statutes, claims which wight have a material collateral operation as furnishing evidence of the title to land &c. are excepted from their power. Difficult and perplexing questions may arise in matters of small as well as large amount, and the principle of all such Courts is to run the risk of a less correct judgment for the sake of having an earlier and cheaper decision, in cases where, from the trivial nature of the claim, a tedious and expensive process is a greater evil than the danger of a less accurate result. This argument evidently applies to difficult as well as to easy questions; the greater indeed the difficulty of a particular class of investigations, the greater is the evil of submitting them to a less skilful tribunal, but it is a question only of degree and does not affect the nature of the argument, though it might in certain instances produce a different opinion as to the balance of inconvenience.

The Court of Common Pleas seems to have been principally impressed with the inconvenience of allowing claims not originally the subject of the jurisdiction of the Courts of Requests, to become so, at least to the extent of enquiring into them collaterally, and Evre C. J. in particular says it would be allowing them to examine into the most intricate questions of mercantile accounts. In certain cases it might, but still the question recurs, if the whole claim in existence at the time of the frigation is within the limited amount, is not the party entitled to just as cheap and summary a remedy in those c. see as in any other? The advantage is as great and the mischief of a wrong decision is no greater.

It seems to me that these arguments of inconvenience do not furnish any sufficient answer to the reasoning on the other side, or to the words of the Statutes. Charters &c. which empower the different Court- in question : and an examination of the different cases which have been decided without any question arising, seems strongly to confirm the doctrine that whenever the whole claim in existence at the time of the action brought is within the limited amount, the inferior Courts have jurisdiction. Without entering into detail, it has been decided, in cases guite independent of the phraseology of particular states, that a debt originally exceeding the amount but reduced below it by part payment, by the circumstance that part of it has been barred by the operation of the statute of limitations or by the infancy of the contractor, is within the authority of the Court of Requests. And why? Because although a larger sum may become the matter of enquiry the whole existing debt is within the necessary amount. On the other hand a debt to which a partial defence exists by reason of set off or tender is not within the authority of the Courts. The principle of this distinction in cases of set off is so clearly explained by Sir V. Gibbs, arg: in Clark v. Askew 8 E. 28, that I will only read his argument (quod lege) and refer further to the circumstance that it required a statute to admit set off as a defence at all. The case of tender is equally clear of explanation: for the plea of tender admits instead of denying the debt; the money tendered must be brought into Court and is taken out under the authority of the judgment, and the whole proceeding goes merely on the principle of preventing vexation on the part of the plaintiff, not on the disaffirmance of the debia.

On the whole therefore I think that whenever there is no debt beyond the limited sum, the Commissioner ought to entertain the case; and this will practically be the same question as whether in this Court, any plea of tender, set off &c. would be required. This question would sometimes be a difficult one; for the distinction between matters of account and payment, and matters of set off, often requires much nicety of application to the facts of a particular case.

The general principle however is clear; whenever by the course of dealing between the parties, the items of their respective accounts are to be set against each other, any monies received or the value of any goods disposed are to be treated as payment or liquidation of any counterclaim, then it is account and not set off; the balance of the account is the whole debt existing and no more could be recovered in any Court except by the negligence of the defendant; and the infector Court has therefore jurisdiction. When, on the other hand, no such course of dealing exists, but the transactions are substantially unconnected, then although the defendant has the privilege of using his counterclaim as a matter of defence, it is at his option to do so or to refuse it; the debt therefore is the whole amount ever due to the plaintiff, although he may be unable to recover it all, if the defendant objects in a proper manner, and it is therefore the province of the inferior Court only to entertain the case.

It remains to enquire whether there is any thing in the establishment of the Court of Requests here to rend r these general principles inapplicable to it, and it seems to me that there is not. The Charter empowers, and the Procian ation effects, the erection of a Court for the recovery of debts and the trial and determination of suits, whenever the debt, duty or matter in dispute shall not exceed the value of thirty two dollars. The only argument that can be raised out of this is, that on the construction I have given to the authority of these Courts, matters of more than thirty two dollars value might be in dispute, and the subject of examination, though the whole recovery was within the amount. I do not however think this argument available, and this for two reasons; I have no doubt that the matter in dispute means the thing claimed and denied, and not any thing which may come incidentally in question, and I am of opinion also that the phrase "matter in dispute" has no application at all to the debts which come in question, but applies only to the unspecified class of cases of small amount to which the power of the Court The clause is to be read, riddendo singula singulis, a court with full jurisdiction for the recovery of debts where the debt shall not exceed the value of thirty two dollars, and for the trial of other suits and causeswhere the duty or matter in dispute is within the same limitation.

On the whole therefore the case had better be returned, by the consent of the parties, to the Court of Requests, for the Commissioner to examine, not whether there has been a regular and final settlement of account, which would give a perfectly new and available cause of action even though the dealings of the parties had not been originally matter of account at all, but whether there was a current account between them at all, as a set of distinct and independent transactions. In the latter case the plaintiff cannot, by now choosing to give credit for some of them, alter their nature: if they are really connected and the balance is the whole debt, the Commissioner should proceed with the investigation. Mr. Warne will of course not apply to the Commissioner to proceed further with the case, unless, in his way of viewing it, the latter is the real history of his dealing with Mr. Gaudart (a)

(a) This case is an authority as to the present practice of the Court under Indian Act 29 of 1866. - See Max. Prac, of the Court of Requests p. 16-18.

IN THE GOODS OF ABDULLAH, DECEASED.

Will of a Mahomedan alienating the whole of his property (although by the Mahomedan Law he can alienate only one third) is good pro tanto. The administration granted by the Court to the Widow revoked, and the Will admitted to Probate. '31st March 1836.

Indian Law Commissioners' Report, 1842.

Morton's Réports, 19.

JUDGMENT OF SIR BENJAMIN H. MALKIN, KNIGHT, RECORDER.

This was an application to set aside the administration granted to the widow of the deceased, a Mahometan, and to admit an alleged Will to probate. There was no dispute as to the execution of the paper treated as a Will; but it was urged on the part of the widow that the Will was inoperative, as not being conformable to the rules of the Mahometan law; the fact that it was not so conformable is admitted, and the only question is, whether for that reason the Will ought not to be admitted to probate.

It would be sufficient for the decision of the present case to observe, that the Will is only at variance with the rules of the Mahometan law, inasmuch as it professes to pass the whole property, and by that law, the power of the testator to bequeath his property extends only over a third part of it. As to that third part, the testator has not exceeded his power, and the Will is at all events good pro tanto. The consequence is, that the administration granted to the widow must be revoked, as having been obtained on the

supposition that there existed no Will at all; and the Will must be admitted to probate (or rather, as I will mention hereafter a course slightly different adopted), as being an authentic instrument, of some force and validity; the question, to what extent it will be operative, remaining unaffected by the mere fact of such admission. This result seems too obvious to require any authority to support it; but such authority, if wanted, will be found in the case of Syed Ally v. Syed Kullee Mulla Khan, Sir T. Strange, Rep II., 180.

As a general rule. I have been unwilling to express any opinion on points of law not necessarily coming before me for decision. And accordingly, in several cases, where the same principle as that contended for in the present case has come incidentally in question, I have avoided expressing any opinion upon it; the parties in some instances having all wished their own law to be carried into effect. and the only question having been what was its true interpretation. and in others the party insisting on the benefit of his own law, having clearly failed to make out a claim, even upon his own principle. I am not willing however, to avoid declaring my opinion in this case; "partly because the expression of it, though not necessary to the disposal of the present application, may prevent the parties from having recourse to farther litigation, which otherwise must almost necessarily ensue; and partly because, as the question is not very likely again to be raised before me, I should be unwilling to have it supposed, as it easily might, from my having sometimes avoided its determination, that I felt it to be of any considerable doubt. I, indeed, have in substance expressed my opinion upon it before; and for that reason also, I am the less unwilling now without absolute necessity, to declare it.

I refer to the case of Rodyk and others v. Williamson and others (24th May 1834), in which I expressed my opinion, that I was bound by the uniform course of authority to hold that the introduction of the King's charter into these settlements had introduced the existing law of England * also, except in some cases where it was modified by express provision, and had abrogated any law prevously existing. I intimated much doubt, indeed, whether I should have agreed on such a construction of the effect of a charter had the question been a new one; but I felt bound by the weight of authority, and decided against the continuance of the Dutch law at Malacca accordingly. The Mahometan law can stand on no better footing, unless by the express provisions of the charter; for the statutes giving the Mahometan and Gentoo inhabitants within the jurisdiction of the King's courts at Calcutta, Madras, and Bombay

^{*} Vide Judgment in Regina v. Willans, 1858.

the benefit of their own laws, apply only to persons so resident. The bulk of the inhabitants of India are otherwise protected.

It may be worth while, however, before adverting to the terms of the charter, to observe that though the Mahometan law cannot, independently of them, stand on a better footing here than the Dutch law at Malacca, it may very easily stand on a worse. place it on the same, it will be necessary to prove that it existed, not as the custom of a particular portion of the inhabitants, but as the law of the place, up to the time of the first charter. I believe it would be very difficult to prove the existence of any definite system of law applying to Prince of Wales' Island or Province Wellesley previous to their occupation by the English; but that law, whatever it was, would be the only law entitled to the same consideration as the Dutch law at Malacca; indeed, even that would not in general policy, though it might in strict legal argument; for there might be much hardship in depriving the settled inhabitants of Malacca of a system which they had long understood and enjoyed, but more in requiring the persons who resorted to these new and almost uninhabited districts (for such they were when we got them) to conform, as all settlers must, unless there is an express exception in their favour, to the law of the land they settled in.

I have said that I consider myself as having, in substance, disposed of the present question in the case of Rodyk'v. Williamson; for all the arguments applicable to the present case would have applied to that also, the laws, customs, &c. of the Dutch being just as much preserved to them as those of any other class of inhabitants, except insamuch as they may be less repugnant to the English law, and therefore less frequently affected by its introduction, and the Dutch law being also, which perhaps the Mahometan law might be proved to have been here, (but that would be a matter of evidence), the law of the country before the charter. The latter argument, however, was disposed of in that case; nor was it there contended that the general words of the charter, saving to the different inhabitants their several religions, manners, and customs, had the operation now ascribed to them.

Nor, in my opinion, can any such operation be sustained. If the question were entirely a new one, it would seem to me to admit of very little doubt. The operation contended for is quite unlimited; it gives to all the inhabitants of these places the full benefit of their own laws, religions, and customs; for no line is drawn to confine the effect of the words relied on, either to any particular nations, or to any particular rights. The effect contended for therefore goes far beyond the state of the law at Calcutta, Madras or Bombay, where the benefit, if it be one, is confined to Mahometans and Hindoos, and is limited to certain classes of rights and privileges. This is not a very probable operation of a charter made for the administration of law to a new population, and where therefore the reasons for such a reservation on the continent of India did not, at least to the same extent, exist.

I confess, I am unable to see any words in the charter which can bear out such a result. The passage relied on with respect to the present question is in page 21; "That the said court of judicature shall have and exercise jurisdiction as an ecclesiastical court. so far as the several religious, manners, and customs of the inhabitants will admit." There are, however, similar passages on other subjects in p. 41,43,47,53; these all differ in the minutiæ of expression, but I think there can be but little doubt that they were all meant to give the same kind of protection. It would be a very dangerous way of construing a document so loose in its expression as the charter to attribute all casual variations of phrase to a definite intention of affixing a different meaning. But in the general impression the charter seems to have intended to give a certain degree of protection and indulgence to the various nations resorting here: not very clearly defined, yet perhaps easily enough applied in particular cases, but not generally, to sanction or recognise their law. In the words of page 43, respecting the criminal proceedings of the court, "due attention is to be had to the several religions, manners, and usages of the native inhabitants:" or as expressed in page 41, process is to be accommodated to such religious, manners and usages, "so far as the same can consist with the due execution of the law and the attainment of substantial justice." In this last extract "the law" is clearly distinct from those native laws which are to be favoured subordinately to it.

I see no reason to ascribe a different construction to the words giving ecclesiastical jurisdiction. And it is to be observed that in the detailed provisions respecting such jurisdiction no such words are found; they are only inserted in the general description of the jurisdiction of the court; it might therefore be open to contend that they applied only to other matters of ecclesiastical cognizance not expressly included in the subsequent minute directions. But without insisting on this, which would probably be too strict a construction. I think there is abundantly enough in these provisions of the charter to show that no such recognition of the different laws of different inhabitants could obtain. The court here is to grant probate and administration of the wills and effects of all the inhabitants, and all other persons who shall leave property here; the courts in the presidencies

of India have such jurisdiction given them only over the estates of British subjects, and accordingly, it has been held at Madras (Chalunnal v. Garrow, Sir T. Strange, II. 153, recognised in Syed Ally v. Syed Kullee Mulla Khan, ib. 186) that no probate or administration was necessary in the case of native estates, though the court did not refuse to grant it. In the same manner it would not be here, for certainly it is neither Malay nor Hindoo nor Chinese law that a party can have no representative character unless derived from the court of judicature established here under the charter of the King of England, and proceeding according to the law used in the diocese of London. The mere fact, therefore, that administration and probate have always been applied for, seems almost to negative, as far as general usage and understanding is material, the argument advanced.

This observation is important, because Mr. Caunter, the Advocate on part of the widow, relies much on the general practice of the Court as invalidating the Will, and recognising the national law of the testator. No decisions, however, are cited in detail, and much of the practice referred to might be only like that which has obtained before myself, that, where the parties contested a matter on the footing of their own law, the court did not interfere to insist on their adopting another. In many cases too, the laws, and usages would be material: the propriety of an administrator's account, for instance, might depend on the religious usages of his nation as to burial; the propriety of his application of property might sometimes depend upon a native law or custom of marriage. And in respect of Wills, to one case of which Mr. Caunter adverted rather more particularly than to any other instance, everything as far as the Will is acted on at all, must depend on its construction merely. I should say that the Court ought very readily to collect from the expression of a Will that the testator intended his property, so far as not particulary disposed of, to follow the law to which he was accustomed. Thus, in a Will very recently exhibited before me, I should have no doubt that a direction by a Mahometan, that the property should be distributed "according to the law of God," imported a distribution by the Mahometan law of descent. * such a party disposed of the third part of his property expressly as that which only he should alienate by Will, I should treat it as a clear declaration of his expectation and intention that the rest should follow the course of that law by which, and by which only, his power was so limited. I put plain and easy cases on purpose, but the same principle would very often, in my judgment, have to be

^{*} Vide Judgment in Regina v. Willans, 1858.

applied. But all these would be decisions not on the legality, but on the construction of a particular Will, and such, in the absence of minute juformation, I should believe to be the character of most or all of the testamentary cases referred to.

On the whole, I should entertain little doubt on the question, had I not the authority of Sir Ralph Rice against me. I cannot, however but think, that though his opinion undoubtedly differed in some degree from mine, it must either the inaccurately reported in the passages referred to by Mr. Caunter, or else must have been given without reference at the time to the provisions of the charter under which he had them ceased to act for nearly seven years. come to this conclusion, because I find him drawing a marked distinction between the civil and criminal law, for which, even independently of the general principle already adverted to, of putting the same construction on provisions generally similar, I do not find that warrant in the special wording of the charter which he seems to have considered to exist. With respect to the criminal law, Sir R. Rice (Art 1386, p. 174, of the Evidence before the House of Lords, 1830) expresses himself in a manner not much differing from my own, though corresponding perhaps to a rather wider interpretation of the clauses protecting the natives. But he draws a distinction between the criminal law and that affecting civil rights, with respect to which he says, that the court was bound by the clause in the charter to administer the law to every part of our mixed population according to their respective laws and customs. Now, in the detailed provisions as to the prosecution of civil suits, no reference whatever is made to the religions, manners or customs of the parties except as to the administration of oaths and the framing of process where the passage in page 41, already referred to, is to be found. And in the general description of the jurisdiction of the court nothing of the kind is said in the enumeration of the causes of action and parties subject to it, and the words of the clause giving it the same authority as the courts of common law and equity in England are only that these powers are to be exercised "as far as circumstances will admit." The distinction therefore between the civil and criminal law would seem, to be rather against than in favour of the more extended adoption of the native laws into the former; and I cannot therefore but think that there must be some error, either in the report of the learned judge's examination, or in his recollection of the words of the charter.

Still it is evident that his practice must have been in some degree contrary to the opinion I have expressed. Under these circumstan-

ces, I cannot but distrust my own judgment; still, as the case, independently of this one authority, seems to me a clear one, I must act on my own impression. The question will probably still be considered doubtful, but I ought not, at all events, to leave it as one where a decided opinion had been expressed on one side only, when my own is equally clear on the other.

It may be desirable to call to notice, that it is the fault of native holders of property if any inconvenience result from the present decision, supposing it to be established as law. The law to which I consider them as subject gives the most unlimited freedom of disposal of property by Will, and any man therefore who, wishes his possessions to devolve according to the Mahometan, Chinese, or other law, has only to make his Will to that effect, and the court will be bound to ascertain that law and apply it for him.

The general result is, that the administration granted to the widow must be revoked, the Will of Abdullah being established as a valid instrument. Still it does not appear to me to amount to a complete Will, constituting Growk the executor of all his property; it is only a disposal of part in his favour, and contains nothing to show that he was intended to have the general management; if not, he is not designated as executor, and he can only obtain administration with the Will annexed in the usual manner, by giving notice and filing a proper petition. The present petition may, however, if he wishes it, be amended to that effect, without payment of costs. But it is necessary to observe that the widow may very probably have a better claim to administration with the Will annexed than he, if she wishes to dispute his right. Where the testator constitutes an executor, the cour has nothing to do with the selection; the Will if effective at all, is effective in that particular. But where the Will appoints none, and administration is therefore necessary, the court has its usual duties to perform, and the parties their usual rights to enforce. The fact that the testamentary paper gives a benefit to a particular individual, may, according to the circumstances of the case, be a strong reason for either selecting him for the administration, or for excluding him from it. But the regular course of petition and notice must be adopted, to give the parties interested an opportunity of coming in and urging their claims.

The prayer therefore of Growk's petition is granted, as far as it respects the revocation of the administration granted to the widow. As far as the grant of any powers to himself is concerned, the petition must be amended. It would be premature to make any order about the costs, while it is yet uncertain, who will have the general management of the estate. But

I entertain no doubt that the widow will finally be entitled to receive the costs of her present opposition out of the estate. The question must at least be considered as one very fit for discussion; and the estate therefore may properly be charged with the costs incurred, in consequence of the doubtful legality of the course adopted by the testator.

Penang Gazette, 31st August, 1839.

JUDGMENT OF SIR W. NORRIS.

In the Cause of Mahomed Meera Lebby, Plaintiff.

28.

Pernembelam, Arnachellam, and Shaik, Defendants

This was an action to recover damages from the Defendants, the Seree Farmers, for refusing to purchase from the Plaintiff 5000 Bundles of Seree or Betel Leaf of which he was the Proprietor.

The Plaintiff in his Petition states, that he is Proprietor of an Estate which produces Seree on this Island, and is also an occasional Importer of Seree within the Farmers limits; that he had become the Proprietor of 5000 Bundles of Seree, and being desirous of selling them to the Defendants tendered them accordingly and requested the necessary permit to import them for that purpose within the limits; but that the Defendants, contrary as the Plaintiff alleges to the Regulation No. 3 of 1830, refused to take them; for which refusal he claims damages.

The Defendants by their plea virtually admit the facts stated in the petition; but say that the action is not maintainable, because the plaintiff was not the Proprietor of the Seree in question within the meaning of the 6th and 7th Sections of the Regulation, but became so by purchase for the purpose of speculation, contrary to the intent and meaning of the Regulation.

The Plaintiff by his Replication, which on strict principles of pleading would be considered argumentative and bad, inasmuch as it neither denies nor confesses and avoids the allegation of the Plea, insists that the action is maintainable, even though it should appear that he had purchased the Seree for speculation. But as Mr. Balhatchet for the Plaintiff has admitted that the Seree was in truth so purchased on speculation from growers in this Island without the farmers limits, the Replication must be viewed in the light of a demurrer, and the Court is now called upon to decide what

is the law upon facts thus ascertained.

A question analogous, but not precisely similar to the present, was decided in the year 1833 by my predecessor, Sir Benjamin Malkin, and I have been referred by the Plaintiff's agent to the judgment in that case † as decisive of the present, with high commendations, at the same time, of the zeal and ability displayed by that learned Judge in expounding the local Regulations. To the justness of this encomium I most cordially subscribe, and no man I should imagine, can read the luminous decisions of that most able Judge, but must be struck with his intuitive perception, accurate statement and masterly solution of the principal difficulties, actual and prospective, connected with any question which happened to come before him for decision. A case, however, precisely such as the present does not seem to have been anticipated by Sir Benjamin Malkin, or, if it, were, he was not called upon particularly to advert Of the two classes of sellers from whom, as decided by Sir Benjamin Malkin, the farmer cannot refuse to buy, the Plaintiff in this case belongs to neither the one nor the other. These two classes, as described in the 6th Clause of the Regulation consist of, first Proprietors and Occupiers of Estates producing Seree (within these Settlements of course) and secondly importers in Prows, (that is from abroad.) The Plaintiff does not claim in either of these two capacities, domestic grower or foreign importer, but in a third and different capacity, not recognized in the Regulation, viz., as a Purchaser from the home growers. It is contended, indeed, that as such he is necessarily comprehended within the general term "Proprietor" in the 7th Section which provides that "for all Seree for Betel Leaf produced or imported within the limits defined the "Renter or licensed person shall pay the Proprietor at such rate "per Bundle as the Governor in Council may determine." &c. And had this been all, had there been nothing in the Regulation to qualify or restrict the meaning of this general term, it might have been difficult to evade the construction contended for. But such is not the case. The 6th and 7th Sections forming parts of the same instrument and the one immediately following the other, must necessarily be construed together to preserve the consistency of both. If taken separately the 7th Section might seem at variance

[†] Inchee Karrim vs. Quay Pang, tried at Malacca.

with the 6th or at least of doubtful meaning; Courts of law will always endeavour, and are indeed bound, so to interpret every instrument as, if possible, to give harmony and consistency to the whole because such, it must be presumed, was the intention of those who framed it. The term "Proprietor," therefore, in the 7th Section, construed with reference as well to the preceding words in that section as to the more precise terms of the 6th Section, must, in my opinion, be taken to mean Proprietor in one or other of these two senses, viz., Proprietor as Importer in prows from abroad, or Proprietor as Producer, that is Proprietor or occupier of the producing Estate in these Settlements.

It has been said, that if the Plaintiff could have anticipated the objection that he was neither grower nor importer within the meaning of the Regulation, and so could not oblige the farmer to purchase, he might easily have obviated the objection, as he or other speculators may do in tuture, by bringing the Scree round by sea instead of by land. It might be sufficient to say that the Court will determine that question whenever it shall arise. But as prevention is always befter than cure, I may as well take this opportunity of intimating that so manifest an evasion of the clear meaning of the Regulation would be at the peril of the party attempting it.

Observations were also made by the Plaintiff's Agent as to the oppressive nature of the Regulation and reference was made to a severe reprehension lately passed upon it by the Right Hon'ble the Governor General. These remarks, it is hardly necessary to observe, were beside the question; and sitting in this place to determine the legal effect of the Regulation I am not called upon to express any opinion with regard to its practical efforts upon the morals or happiness of the people; although on the Criminal side of the Court both I and my predecessors have too frequently found ourselves obliged to do so. It is sufficient on the present occasion to say that in this, as in all other cases of real or imaginary grievance, there is a constitutional mode of seeking redress. One other remark, however, suggest itself with reference to this particular case, viz., that whatever may be the hardship on growers of Seree, no mere speculator such as the Plaintiff has any right to say, that his common law rights are invaded by the monopoly; nor can it be imagined that the framers of the Regulation had the slightest intention to provide for such persons an equivalent for contingent losses by speculation, or to afford private monopolists the means of defeating, for selfish gain at the expense of the community, a Government monopoly established for purpose of public Revenue ostensibly applicable to objects of public benefit considerations, which might alone have furnished a key to the true meaning of the Regulation in cases like the present, even had its terms been more equivocal than they are.

Judgment for Defendants with Cost.

WILL OF THE LATE MR. GALASTAUN,

IN THE GOODS OF "CATCHATOOR GALASTAUN" DECEASED.

The proper execution of a codicil according to the Indian Will's Act 25 of 1838 is sufficient to support the Will to which it refers, although the Will be not properly executed, if the Will and Codicil be written on the same paper, or be annexed to each other, and the witnesses attesting the latter,—see both papers.

This is an application for Probate, against which certain relatives of the deceased have entered a caveat, the object of both parties being amicable, and to prevent future litigation by obtaining the opinion of the Court as to the validity or invalidity of a document purporting to be the last Will and Testament of the deceased.

The alleged Will, by which the testator, an Armenian merchant, disposes of the whole of his property in manner therein mentioned, bears date at Penang the 31st Dec. 1839, is written in the Armenian language and purports to have been signed and scaled in the presence of three witnesses, Mr. Lewis, Mr. Palmer, and Mr. W. Norman McIntyre, the testator signing his name both in Armenian and in English. It appears however, that although the testator acknowledged his signatures to each of these witnesses, and each attested the document in his presence, he did not sign or acknowledge his signatures in the presence of any two of them "at the same time," as required by the Indian Act XXV of 1838, Sec. 7, but to each separately and on three different occasions, the last witness signing nearly a year after the two former. The last witness, Mr. McIntyre, did not subscribe until the 26th November 1840, when being at the house of the testator, the latter produced his Will acknowledged his signatures thereto and asked Mr. McIntyre to attest it, which he accordingly did, seeing that only two winnesses

had signed and supposing three to be still necessary as before the Act. Another person, Mr. Gregory Zechariah, (since deceased) was also present and saw and heard all that passed. The testator then expressed a wish to add a Codicil, which Mr. McIntyre, at his request and by his dictation, wrote in English at the foot of the Will, on the same sheet and commencing in these words, "Codicit to this my last Will and Testament," whereby the testator makes a further bequest to certain of the legatees named in the Will This Codicil was executed in due form, as required by the Act, having been "signed by the testator in the presence of two witnesses present at the same time," viz., the said Mr. McIntyre and Mr. Gregory Zechariah, both of whom "subscribed it in his presence." The question, then, for the decision of the Court is, whether, under all the circumstances, the Will is a valid Will within the meaning of the Indian Act; and the question might be one of some nicety if it depended altogether on the decisions under the old law, which are very numerous and in some respects not easily reconcilable. But there is no occasion to enter into that wide field and examine the fine distinctions which have been drawn between original publications and republications, express or implied, or between Codicils and Memoranda or sequels of incipient Wills. The terms of the Act are happily too plain to render it necessary to search in that labyrinth of learning and ingenuity for a satisfactory answer to the present inquiry. I may observe. however, that this case is very plainly distinguishable from those of Lea vs. Libb, 3. Mod. 263; Bond vs. Seawell. 3 Burr, 1773; and Attorney General vs. Barnes, 2 Vern. 597; which have been cited in argument for the purpose of shewing that the attestation of a Codicil is not alone sufficient to support the Will to which it refers. In Lea vs. Libb, the Will and Codicil were written on different pieces of paper, neither the one nor the other had the requisite number of witnesses, as the law then stood, and of the two witnesses to the Codicil one had not seen the Will to which it referred. In Bond vs. Seawell, also, the Will and Codicil were on distinct papers and the special verdict left it doubtful whether the witnesses had seen all: and in Attorney General vs. Barnes, where the Will and Codicil were also distinct, as appears from the fuller report of that case by Lord Chief Baron Gilbert, it is clear that the witnesses to the Codicil had not seen the Will. The case of Carleton vs. Griffin 1. Burr. 549, has also been referred to as adverse to the validity of the present Will, because altho' the attestation of the subsequent writing there was held to be a sufficient attestation of the Will, it was

expressly on the ground that the additional writing was part of one entire Will, and not a Codicil; which it is argued, was tantamount to a decision that the attestation of a Codicil being distinct from the Will is no sufficient attestation of the Will itself. But as the late Statue, on which the Indian Act is framed. has, in accordance with what had been laid down in Burnes es. Crow, 1. Ves. Junr. 490; Brown vs. Shirer, 4 Bro, C. C. 60; Piggot vs. Walker 7 Ves. Jun. 98 and many other cases, declared that a Codicil is part of the Will, all making but one Testament, the argument from Carleton vs. Griffin makes the other way; for the observations of Lord Mansfield in that case are strictly applicable to the present. "The testator," says he "plainly considers the whole as one entire disposition—the signing the former part does no harm; it makes it more solemn, but does not hurt it. He takes up the sheet of paper, and holding up the said sheet of paper says, 'it is my Will.' And certainly he did not mean a part of it only, but the whole of it. And he desires them to attest it." To the same effect are the observations of a very sound lawyer, Mr. Serjeant Hill, in his note on the case of Bond vs. Seawell, 3 Burr 1775. "when the Codicil," says he "is at the time of the execution of the Codicil indersed on or annexed to the Will, if the testator see the witnesses attest the execution of the Codicil they must necessarily see the Will, and therefore their attestation of the Codicil goes to the attestation of the Will, the Codicil and the Will being but one Will; and consequently the testator's seeing the witnesses to the Codicil attest the execution, does in effect see them execute the whole Will as much as if the Will and Codicil had been all upon one paper;" and here they are both upon one paper. It is true, Mr. Roberts in his Treatise on Wills and Codicils (3d. Ed. pa: 105.) lays it down "that if the Will were not executed and attested according to the statue, the Codicil could not help the defect, although it had the requisites of the statue; for what was bad in its creation could not be made good by any thing ex post facto." But this appears to be rather a refinement of the author's own than a fair deduction from decided cases, and it is not reconcilable with the above observations of Lord Mansfield and Serjeant Hill. The terms of the Act itself, however, by which the decision in this case must be chiefly governed, appear to remove all doubts, if any could remain, upon "The general objects of the Act are," as Sir the subject. Edward Ryan has observed, "to remove danger and error and litigation, arising from Wills made by persons unaccustomed to legal forms and to lay down rules so plain and simple that they may be easily understood." It gives the most compre-

hensive meaning to the word "Will" extending it to a Testament, a Codicil, an appointment, &c., and to any other Testamentary disposition," and declared that "any Will executed in the manner therein required, shall be valid without any other publication thereof." Now altho' up to the 26th Nov. 1840, the date of the Codicil, the Will was certainly invalid as not having been executed according to the Act: vet the due and regular execution of the Codicil as, both in law and by the testator's express declaration "a part of that his last Will and Testament" was in my opinion, a virtual execution of the entire Will, within the terms of the 17th Section of the Act. This Section, after enacting "that no obliteration, interlineation, or other alteration made in any Will, after the execution thereof, shall be valid or have any effect,.....unless such alteration shall be executed in like manner" &c. expressly adds, -"but the Will, with such alteration as part thereof shall be deemed to be duly executed, if the signature of the testator under the subscription of the witnesses be made in the margin or some other part of the Will, opposite or near to such alteration or" (as is the case here) "at the foot or end of or opposite or near to such alteration" &c. Now that a Codicil may be termed an "alteration" of the Will is plain from the definition of Swinburn and Godolpkin who describe a Codicil as "an addition made by the testator, and annexed to and to be taken as part of a Testament," and there the actual alteration consists in the subsequent bequest to one legatee of certain property which would have otherwise gone to several in the proportions mentioned in the Will. But should this be thought too great a refinement on words, and doubts be entertained whether a Codicil can be regarded as one of the kind of alterations contemplated by the 17th Section, I am of opinion that the mere fact of the testator's having acknowledged his signatures to the Will in the presence and hearing of "two witnesses present at the same time"-viz, Mr. McIntyre. and Mr. Zechariah followed by "their subscription," of the Codicil "in his presence," -such Codicil being on the same sheet with, and an indisputable part of the Will, was a valid execution of the entire Will within the meaning of the seventh section of the Act.

The Will therefore is pronounced to be valid, and Probate will be granted accordingly.

24th July, 1841.

BEFORE SIR WM. NORRIS, Knt., RECORDER.

In re the Brig "Freak"

A person who captures a ship and goods from a pirate, has no right to detain them as against the owners. One sixth of the value of the ship, cargo and freight saved, is a fair compensation in such a case.

The Judge—This is a case of salvage claimed by the Rajah of Acheen, through his Agents, Mr. Charles Scott and Sri Perdahana Panglima Banda, for the recovery of the Brig "Freak" and her cargo from a body of insurgent convicts, who on their voyage hither from Bombay had dispossessed the master and crew and after murdering the former and his chief mate had brought the vessel and cargo to Acheen, where they were seized and the property secured by the claimant and finally brought in safety to Penaug.

On the part of the owners, against whom a nomination had been granted to shew cause why salvage should not be decreed to the claimant, Mr. Carnegy contended, on general grounds, that the claim could not be supported: that the Rajah had not taken the vessel from the convicts who had voluntarily given it up to him; that he had incurred no risk, danger or trouble in the matter, that, even were it otherwise, he had done no more than his plain duty as an independent Prince and a professed friend and ally of the British Government in dispossessing the convicts and securing the vessel and cargo for the owners; and that, moreover, there were circumstances as disclosed in the affidavits, which tended to show that so far from being entitled to any remuneration, he had laid himself open to the charge of a guilty participation with the convicts in conniving at the escape of several of them and in the abstraction of a portion of the cargo.

Mr. Logan, for the claimant, said that as all the facts of the case were disclosed in the affidavits and the depositions of the witnesses on the trial of the convicts he would leave the evidence to speak for itself and at once address himself to the law of the case, only observing that enough had been proved to exonerate his client from the charge of either making away with any part of the cargo or conniving at the escape of any of the convicts. He then contended, at some length, that the Rajah would have been justified, on recognized principles of English law, in appropriating the entire ship and cargo to his own use; that he had acted, however,

with propriety and honor in first submitting his claim to a British Court of Justice; that, however hard it might appear upon the owners, the Court would unhesitatingly, if his view of the law were correct, decree the whole to the claimant, or at least a moiety; and that nothing could be more politic than such a course, more honourable to the British character or better calculated to effect the entire suppression of piracy by ensuring what was indispensable for the purpose, the cordial co-operation of the native chiefs.

The argument for the claimant is founded on Lord Mansfield's dictum in the case of Goss vs: Withers, 2 Burr 695, that "in Spain, Venice and England, the goods go to the captor of the pirate against the owner." But to understand the full import of this observation and the argument raised upon it, the passage must be viewed entire and with reference to the context. The real question in that case was, as to the precise time when the insured after the capture of a vessel by the enemy, was entitled to abandon, as for a total loss, to the insurer: but an irrelevant question was also started by the counsel, as to the time when, by the law of Nations, the property in such cases was changed or divested out of the original owner and transferred to the enemy. After an able review of the various opinious of foreign jurists on this latter question. Lord Mansfield states what he had ascertained to be the practice of the Court of Admiralty in England, before any act of Parliament committed restitution, or fixed the rate of salvage, viz. "that they held the property not changed so as to bar the owner, in favour of a vendee or recaptor till there had been a sentence of condemnation. He then refers to two remarkable cases, which had been decided on this principle and continues; "but whatever rule ought to be followed in favour of the owner against a recaptor or vendee, it can no way affect the case of an insurance, between the insurer and insured." And then after pointing out the distinction between the two questions, he proceeds, in further illustration of the distinction as follows; "a capture by a pirate (and in Spain, Venice and Eng. land, the goods go to the captor of the pirate against the owner, as there can be no condemnation to entitle the pirate) or a captor under a commission where there is no war, do not change the property, yet, as between the insurer and insured, they are just upon the same footing as captures by an enemy." Such is Lord Mansfield's dictum; and the construction which has been put upon it, in favour of the Rajah's claim to the whole of the property now in question. is as follow: "In cases of capture by an enemy, the property is not changed so as to entitle the taker and give an absolute right

to the recaptor, until condemnation. But as there can be no condemnation to entitle a pirate the general law is not interfered with, and the recaptor obtains the goods and the owner cannot be restored." Now this "general law," or "simple law of nature" as it was called in the introductory part of the argument for the claimant, was broadly defined thus: "The moment the owners, or those who are in possession for the owners, of a vessel, are divested of possession by those who have the will and the power to retain that vessel as their own, the captors have become the proprietors, and the vessel is lost to the original owners." And this law, it is further contended, though altered by express Acts of the Legislature in cases of recapture from an enemy, remains "stationary" in cases of recapture from pirates.

It is needless to demonstrate the fallacy of this reasoning,—to prove that "might" is not always "right," or to cite authorities in support of one of the first precepts of the law of nature "suum einque tribuere." If the rule contended for ever obtained in England, it must have been the creature of positive institution for a particular purpose the suppression of piracy, but certainly formed no part of the law of nature or of nations above the savage state.

Nor is it necessary to point out the palpable inconsistency of a claim to the whole as a recompense by way of salvage. Sir. Edward Gambier's observations on a similar claim by one of the salvors in the case of Brown and others vs. Duncan, tried at Singapore in 1836 are strictly applicable here: "The claimants own standard of remuneration taking the lion's share, is one, certainly of a novel and extraordinary kind; it appears to me to involve a contradiction in terms, that he claims this as a compensation by way of salvage; for salvage being the consideration paid by owners of property lost or endangered for the benefit accruing to them from its recovery or rescue, it seems to me that neither the name nor the thing itself can exist when nothing is recovered or restored."

But as anything which fell from so great an authority as Lord Mansfield, especially on questions of maritime and commercial law, is entitled to the most respectful consideration. I have consulted every book within my reach which seemed likely to throw light upon the above quoted remark, though a mere parenthetical obiter dictum, not necessarily connected with the question at issue in the case of Goss vs. Withers, and certainly the observation derives weight from the circumstance of its being left apparently unquestioned, as well in the annotations of Sergeant Hill as in the many subsequent references to the case by Lord Mansfield himself and by other

judges, besides, being cited and upheld as an authority in the Lex Mercatoria (title pirates), edited by the late Mr. Chitty, not that I have any doubt as to the present state of the law upon the subject, whatever it formerly might have been. The enquiry therefore, is rather one of curiosity than of practical utility as regards the present claim. That the Rajah has no pretext whatever, in law or justice, for laying claim to the whole of the property, even where the claim reconcilable with the term salvage, I am quite clear. In Lord Tenterden's admired work on Shipping (5th Editn. pa. 17.) he states, with reference to the Statute 27th Ed. 3rd st. 2, c. 13 that "capture by pirates, who are mere robbers at sea, does not divest the property of the owner; and in a very early period of our history a law was made for the restitution of property so taken, if found within the realm, belonging as well to strangers as to Englishmen. But capture by an enemy in the exercise of war between two nations, does according to the law of nations, wholly divest the property of the owner and transfer it to the captor or the Sovereign of his State at some period," &c. Molley, also (as cited in Viner's Ab. title Piracy, and again in the Lex Mercatoria, same title,) after referring to the above statute of Edward the 3rd, proceeds as follows: "This law hath a great affinity with that of the Romans de Usucapione or the Atinian law, as Atinius therein enacted that the plea of prescription, or long possession, should not avail in things that had been stolen, but the interest which the right owners had, should remain perpetually," to which is added in the Lex Mercatoria: "no right to the spoil vests in the piratical captors, no right is derivable from them to any recaptors in prejudice of the original owners; and this appears not only to have been the opinion of the writers on general jurisprudence, but to have been always maintained in our Courts of common law." And the author refers to Grotius de jure Belli ac Pacis lib. 3. c. 9. Godbolt 193, and Cro. Eliz. 685. The Editor of the Lex Mercatoria the late Mr. Chitty, repeats the same, almost verbatim, in his Treatise on Commercial law Vol. 3rd Ch. 13, and Sir James Park and Serjeant Marshall in their respective Treatise on the law of Insurance. virtually assert the same, by enumerating the saving or recovery of a ship or goods from pirates, as one among the species of service entitling to salvage or an allowance for the property saved; which would be inconsistent with a claim to the property itself. Had the law of England ever countenanced such a claim, it is extraordinary that none of these writers, each of whom refers frequently as well to the case of Goss vs. Withers as to all the most celebrated works, English and Foreign, ancient and modern, on Marine law;

should not even in a passing way, have noticed the former existence of such a rule. I find no allusion to it in the two most ancient books of English law in my possession, Glanville and Horne's Mirror, though perhaps the subject scarce came within the scope of either of those writers. But it is certainly not mentioned in the Naval Laws of Oleron, where, it anywhere, some trace of it might have been confidently looked for, compiled and promulgated, as that ancient digest is said to have been, by an English Prince, Richard the First. Nor, (if the abstract in Horsley's Laws, Ordinances and Institutions of the Admiralty of Great Britain is correct and I have no reason to doubt it) is there any allusion to it either in the Laws of Wisbuy or in the Ordinances of the Hanseatic League.

I regret that I have not the means of referring to the still more ancient and celebrated Marine Code, the Consolato del Mare, so highly commended by Lord Tenterden, "from which" says Serjeant Marshall on the authority of Vinius, "most of the Marine Laws in Spain, Italy, France and England are borrowed, and the regulations of which are still of very high authority in every maritime State in Europe;" though had the rule in question been noticed there, it is not likely to have been passed over unnoticed in the latter digest above mentioned. Nor were there any reference to it in the famous Marine Ordinance of Louis the Fourteenth, published in 1661, (which I have also to regret the want of,) is it to be imagined that Lord Mansfield, Lord Tenterden, Beaumes, Chitty, Parke and Marshall should all have failed to notice such reference, forming as that Code does, according to the last mentioned learned writer, "a system of whatever experience and the wisdom of ages had pronounced to be most just and convenient in the Marine institutions of the Maritime States of Europe;" more especially as "Lord Mansfield" says the same writer "seems to have drawn much of his knowledge of the principles of Marine law and of the law of Insurance from this ordinance and from the elaborate and useful commentary of Valin." The last authority I shall mention, as affording from his silence a strong negative argument against the supposed existence of any such rule in former times is Lord Coke, whose reseaches had it ever existed, it is not likely to have escaped, nor in his exuberant learning to have been left unrecorded by him in his Institutes or Reports; especially as a fair occasion presented itself, twice at least, for the mention of so remarkable a fact.

In a case reported in Jenkins' Centuries and 3rd Bulstrode, and in some points analogous to the present, it appears that the

Lord Admiral had seized a vessel in the River Thames and insisted on his right, under the King's letters patent, to retain it against the owners, as a recapture from priates, the crew having risen upon the master, dispossesed him and committed piracy at sea. In his 12th Report, page 73, Lord Coke states: "The King, James 1st, referred the consideration of the letters patent of the Lord Admiral of England to the two Chief Justices and the Chief Baron; whether by the said letters patent, the goods which pirates should take from others by robbery and piracy did pass to the Lord Admiral or no? And upon the consideration of the said letters patent it appeared to us, that thereby he had bona et chattalla viratorum, and also bong et chattalla depredata, id est, the goods robbed from others, which did not pass for two causes"-which he states at length, the first being, that in the analogous case of a grant of bong et chattalla fellonum, the grantee would be entitled only to the felons own goods and chattels, not to what he had stolen from others: the second cause being, that the King had no power to make a grant contrary to the Statute of 27th. Edward 3rd, which directs the restoration of goods retaken from pirates to the right owner on due proof. "But it was resolved," he adds, "that until such proof be made, the King may seize the said goods; for goods of which the property is unknown, the King may seize; and if they are bona piratura the King may sell them; and upon proof &c restore the value." Not a word here of any prior usage or custom, actual or supposed, under which the recaptor could lay claim to such goods, even where the owner was unknown. Nor is there a hint of any such custom or usage, as constituting even a plausible reply to the severe remarks in the answer of the judges (4th Inst. cap. 22) to the complaint made to the King by the Lord Admiral of England, concerning prohibitions granted by them against the Court of Admiralty. In the Judges' answer, it is stated among other things, "that the Lord Admiral, his lieutenants, officers and ministers had, without all colour encroached and intruded upon a right and prerogative due to the crown, in that they had seized and converted to their own use goods and chattels of infinite value taken by pirates at sea and other goods and chattels which in no sort appertained unto his lordship."

It remains to advert briefly to the authorities on which Lord Mansfield's dictum in Goss vs. Withers is said to have been founded; premising that if the Report of his lordship's observation be substantially correct, there would seem to be an error of the printer in placing the latter of the parenthetical brackets where it stands in the Reports, as above cited, instead of placing it after the word owner; when the passage would read, as the Reporter probably

intended, thus viz; "a capture by a pirate (and in Spain, Venice and England the goods go to the captor against the owner;) as there can be no condemnation to entitle the pirate, or a capture under a commission where there is no war, do not change the property." This contraction of the parenthesis renders the whole passage clear, and removes what before appeared absurd. The pirate's want of title is a very good reason why the owner's title should remain unchanged, but cannot of itself give a title to the recaptor. Non tunn, ergo non suum, sed meum, is very bad logic, to say the least.

The only subsequent reference to this observation of Lord Mansfield appears to be the passage in the Lex Mercatoria, wherein, after quoting his Lordship's words, the author or editor adds, and this is agreeable to Grotius de jure Belli, Lib. 3. C. 9, and to Loccennius de Jure Marit. The latter work is not within my reach. but the writer is mentioned with respect by Serjeant Marshall and Chitty and classed with Bynkershoek and other foreign jurists of celebrity. The authority of Loccennius alone, however or of any other foreign jurists, on such a point, unsupported by any respectable English author, can of course have no weight in an English Court and yet Loccennius (if even he shall be found to have been correctly cited) is the only authority, as far as I yet know, that can be adduced in support of Lord Mansfield's dictum; for Grotius certainly does not bear it out in the only point material to this Court, this is as to the alleged existence of such a law or custom in England. After noticing that, by the law of nations, the property in goods taken by pirates or robbers is not changed, and that on this principle the Athenians were unwilling to receive from Phillip of Macedon except as a restoration (ut redditam, non ut donatam, volebant accepere) the Island of Halonesus, which had been taken from them by pirates, and retaken by him, he adds, that it may be otherwise ordered by positive institution; thus by the law of Spain, ships taken from pirates become the property of the captors (Potest tamen lege civilli aliud constitui: sicuti, lege Hispanica. naves a piratis captæ eorum fiunt qui eas eripiunt piratis.) And he considers it not unjust that private property should be sacrificed for the public good, especially when recovered with so much difficulty; but that such a law would not prevent foreigners from reclaiming their property. In a note he intimates that the same law obtained in Venice: "Idem apud venetos-Patet ex literis Fraxinii Candi Tomol." But he makes no allusion to a similar law in England and it is remarkable that Chief Baron Comyn, in referring to this passage of Grotius, in his digest (Admiralty, E 1.) appears to contrast this Spanish law with that of England. "By Jus. Gentium" says he,

"the taking of goods by piracy does not alter the property...Gro. de Jure Belli, &c (But by the Civil Constitution the property may be given to the captors, Ibid. And so it shall be by the law of Spain, Ibid.) And therefore, when goods, taken by pirates are brought to England, the owner may take them.

That a law similar to that of Spain and Venice ever obtained in England appears, then, to be extremely doubtful, to say the least; and certainly the only argument for the affirmative is the observation of Lord Mansfield's, which though entitled to respect (supposing the Report to be correct) cannot, as a mere obiter dictum, be viewed as a legal authority. But that the law, if it ever obtained, has long ceased to exist, is, as above shewn, abundantly clear.

Having thus disposed of the Rajah's claim to any extraordinary and extravagant remuneration as a matter of right, and which as a matter of policy, (if that were a legitimate subject for consideration in this place,) would for reasons perfectly obvious but the very reverse of what have been urged in its favour, be as inexpedient as it is undeserved: I have only now to consider the nature and extent of the service performed by the Rajah in saving the vessel and cargo and the amount of compensation which he is therefore fairly entitled to claim from the owners. And in estimating the rate of salvage regard must be had, as in all such cases, not merely to the labour and peril incurred, which in the present instance can scarcely be said to have been great, but to the discretion, promptitude and alacrity manifested by the salvor as well as to the value of the property and the degree of danger from which it was rescued. Now that the vessel and cargo, though brought into Acheen harbour by the convicts for the intended purpose of being delivered to the Rajah as the price of their protection, were in a state of extreme danger until these reckless and desperate men were dispossessed and secured, it is impossible to doubt. And it is equally undeniable that the Raiah showed great prudence and decision in at once despatching a strong and well armed force to take possession of the vessel, instead of either trusting on the one hand to the promises of unprincipled men, or on the other exciting their fears or suspicions (and none surely had greater reason to be fearful and suspicious) by an uncertain or wavering conduct. Either of these latter courses was pregnant with danger. Over-confidence was as likely to be disappointed. as hesitation to create alarm; and a fearful catastrophe, the murder of the few remaining Europeans on board, the scuttling or firing of the ship and the escape of all the convicts with as much plunder as they could carry away (something like which appears to have been intended by the arch-villain Hadje Hussain) was

in all probability averted by the prompt and resolute proceeding of the Rajah. Nor, considering the valuable and tempting nature of the cargo, chiefly opium, and the well-known character of the Achinese, can it be doubted that he adopted the wisest and safeat course in having the cargo landed and placed near his own dwelling, so as to be under his own immediate and constant protection. It is idle to say that the Rajah was chiefly influenced by a regard for his own safety, and that he could not have acted otherwise without knowingly exposing himself to the vengeance of the British Government. That he may have been swayed by such considerations is quite possible; but when conduct is meritorious, it is not for fallible man to ascribe unworthy motives; and whatever his motives were, even supposing them to have been purely selfish, the owners of the ship and cargo are no less indebted to him for the salvation of their property, and no less morally or legally bound to make him a reasonable remuneration. Neither can I admit that the owners were entitled to calculate on the gratuitous services of the Rajah, as an independent Prince and a friend and ally of the British Government; although, doubtless, this Government would have had reason to complain had he refused to interfere and afford all necessary aid in such an emergency. With regard to the supposed abstraction of two chests of opium, the evidence is contradictory and the point appears to me to be involved in 100 much doubt to warrant the inference that the Rajah is accountable for that deficiency. am bound to add that although the evidence with regard to the escape of several of the Mahomedan convicts is unsatisfactory and such as to justify the Government in calling upon the Rajah for further explanation on that point, there is, judging from the evidence adduced, room for doubt whether he could have prevented that escape; and, at any rate, there is nothing before me sufficiently conclusive upon the subject to bear out the serious charge of connivance on his part, or to justify the Court in refusing or withholding the consideration which is due to him for the preservation of the ship and On the other hand, in estimating the amount of that consideration, the Court certainly is not in law or reason bound to pay any attention to the alleged custom of Acheen by which the Rajah is said to be entitled to a moiety of the property saved or rescued. and which seems to be akin to the ancient barbarous usage in some parts of Europe so severely denounced and prohibited under the the severest penalties by the 15th and 16th Articles of the laws of Oleron,—an unreasonable and accursed custom in some places, that the third or fourth part of the ships that are lost shall accrue to the lord of the place where such casualties happen; so also the like

proportion to the salvors, and only the remainder to the master, merchant and mariners. To no such vicious custom will this Court The rule laid down by Lord give countenance or encouragement. Stowell in the Two Friends, 1, Rob. 279, is at once equitable and clear, viz; that in case of rescue by British subjects, the Court usually adopts the proportion or recapture, but it is not bound to do so, nor is the reward limited, in respect to foreigners the quantum meruit is the only guide; and every person assisting in the rescue is entitled to share. I have not been able, nor did I expect, to find any recorded cases precisely analogous to the present. which approaches nearest to it, though, in the main, materially different, is that of the Trelawney, Lake master, 4 Rob. 223 which is described as a "new species of salvage," being for the rescue of a slaveship from insurgent slaves on the Coast of Africa, by another slave-ship. The affidavit of the salvor, Mr. Kendal, master of the Lord Nelson, stated among other things "that the slaves on board the Trelawney, 35 in number, had risen upon the captain and crew and got complete possession of the ship in about five minutes; that the captain and all the crew, except two men who were wounded, got through the cabin windows into two boats belonging to the Trelawney, and rowed away to the Lord Nelson; that the Deponent commenced a heavy fire from his great guns and small arms into the Trelawney, despatched thirty of his men who boarded her, and after a severe conflict succeeded in quelling the insurrection." Lord Stowell in giving judgment said; "I have nothing to do but to consider the value of the property that has been saved and the service performed, it is meritorious service, to be considered as a rescue effected from pirates, and to say the least of it, full as meritorious as recovering property out of the hands of the public enemy." In the point of personal danger encountered by the salvors, that case bears no resemblance to the one now before the Court: but in the more material circumstance on which Lord Stowell laid great stress, viz; "that the crew of the Trelawney had been completely overpowered," the analogy holds. The salvage awarded was only a tenth; on the ground that "both ships being employed on the same trade, a service of common danger, the crews of each probably went out under an impression of the policy and duty of rendering mutual assistance," but for which consideration, however, the learned judge said he should have been "disposed to give salvage in as high a proportion as is directed by the Prize Act for cases of recapture of war," (namely a sixth). The case of the Trelawney, therefore, appears to me, unassisted as I am by the criterion of any offer of compensation by the owners, to constitute on the whole a very safe guide in computing the proportion of salvage fairly due on the present occasion; and I a coordingly decree to the salvor one sixth of the agreed value of the ship, cargo and freight, with his expenses, subject however to the deduction which I will mention. The agreed value of the entire property saved is Drs. 58,000 of which one sixth will be Drs. 9,666-67, and from this latter sum I decree Drs. 666-67—to be paid to the surviving officers and apprentice in the following proportions, viz:

To Francis Warde, 2nd Mate, drs. 250
William Plumb, Steward, ,, 200
The Gunner.........., 36
The Carpenter......., 36
William H. Stonehewer, Apprentice , 100

I am aware that as a general rule the crew are entitled to no extraordinary compensation for doing their duty in saving the property entrusted to their care. But in cases of capture by an enemy and subsequent recapture by the crew themselves, they have occasionally been rewarded with a considerable salvage; and the Statute of 22nd and 23rd Charles 2nd, 11th and 12th William 3rd, and 8th Geo. 1st. ch. 24th "for the more effectual suppression of piracy." provide liberally for the reward by the owners of seamen who oppose a determined resistance to pirates. The present, perhaps, is a case scarcely within the literal meaning of these Statutes; yet the words of the 5th Sec. of the last Act are very comprehensive. and the Act expressly extends to all His Majesty's dominions in Asia. Africa and America. In the present instance the persons above named manifested every disposition to do their duty to the owners in the perilous and unequal conflict in which they and their unfortunate captain and chief mate suddenly found themselves engaged, unarmed, and in the midst of darkness and tumult, with an overwhelming body of desperate men. Two of them were actually wounded, the apprentice desperately; they have lost the whole of their little property; for many weeks together they stood in hourly peril of their lives; they nevertheless by their continued steadiness and vigilance, and "by keeping a good look out" (to use the words of the 2nd Mate) contributed materially to the safety of the ship and cargo during the perilous voyage to Acheen. after the murder of the captain and chief mate and as the leading convict confessed, saved the lives of all by bringing the ship into harbour.. Self-preservation was, of course, the motive uppermost in their minds, but the owners have nevertheless reaped the benefit of their discretion and good conduct, and as the discretion of the Court

is large in all cases of salvage, I feel that under all the peculiar circumstances of this case and on the equity of the Statutes to which I have referred, I am not transgressing any legal principle in awarding the above sums to the persons I have mentioned.

1842.

Before SIR WILLIAM NORRIS, Knight, Recorder.

In the cause of, Lim Bee, Plaintiff,

28.

Jadee, Defendant.

JUDGMENT.

This is an action to recover damages for the seizure and detention of the Plaintiff, his boat and certain arms, opinm, tin, money and other articles mentioned in the Petition, at Batoo Kawan in the month of November last. The defence, in substance, is that the defendant as Commander of the Gun Boat "Emerald," one of the armed vessels employed by Government for the suppression of Piracy and the general protection of Commerce in these seas, seized and conveyed the Plaintiff, his boat and arms to the nearest constituted authorities, as being unprovided with a regular pass from Kurow in the Perak Territory, the place whence he last came, and having attempted to impose upon the defendant by the production of an expired pass granted to another person on a different occasion and authorizing that person to carry arms differing in quantity and description from those found on board the Plaintiff's boat: "such discrepancy, irregularity and attempt to im-"pose affording, as it appeared to the defendant, reasonable grounds "for suspicion and sufficient cause for him in the execution of his "duty and the orders and instructions he had received" to make such seizure and detention; and that as to the seizure and detention of certain Opium or Chandoo found on board the Plaintiff's boat and supposed to be illicit, together with certain pice, supposed to be the proceeds of illicit sales of Chandoo, these were in fact seized by the Opum Farmer's Peons and merely placed by them in the defendant's Gun Boat for safe custody until they were, pursuant to orders, delivered over by the defendant to the Opium Farmer himself at Prince of Wales Island.

The material facts, as they appeared in evidence on the trial, after making due allowance for contradictions and discrepancies in the testimony of the witnesses on both sides are as follows: In consequence of the alarming extent of Piracy in the Straits of Malacca, an understanding has for some years past subsisted between the

British Government and the Rajahs of the principal Native States in these parts that all boats quitting their Ports or those of Penang, Singapore or Malacca, should be provided with passes specifying the respective destinations, cargoes, quantity and description of arms on board and other particulars; and that boats unprovided with such passes should be liable to detention. Mr. Garling the Resident Councillor and Chief Executive Authority in Penang, who was called as a witness for the defence, declared that this understanding had been established shortly after the memorable destruction of Pirates by Captain Chads of H. M. S. Andromache in 1836 or 7, and he produced a printed form of the pass since issued at this port to the Nacodahs of Native Vessels in conformity with such arrangement.—The local authorities he said had acted in this matter with the sanction and under the express direction of the Supreme Government, and that general instructions had been given to the Commanders of the Gun Boats forming part of the Marine Establishment here, the defendant being one of these Commanders, to examine the passes of Native Boats and to detain them in cases of suspicion. He added, however, that he had refrained from giving these men any very precise instructions, and was indeed afraid to do so, lest his directions should be misunderstood and abused. To shew that the principal Native States had recognized and acted upon the arrangeneut in question be refered to an original letter from the Rajah of Acheen to the Governor received in July last, and which Mr. Bonham had placed in his hands, from which he translated a passage to the effect that all boats leaving Acheen without passes were to be looked upon as Pirates. Another letter to Mr. Garling himself from the Rajah of Perak to the same effect with regard to boats leaving the ports of that territory was also produced on behalf of the defendant, bearing date the 20th August last. It is true these letters both purport to have been written several months posterior to the seizure in question: but I do not consider this material for two reasons,-first, that the writers appear to recognize the arrangement as of some standing; and secondly, that the Plaintiff himself had virtually recognized its existence by having as his first witness declared taken a pass when he left this Port for Perak last year and another pass when he left Perak on his return hither just prior to the seizure complained of-a copy of the correspondence between the Supreme Government and the Governor of the Straits was also tendered in evidence to shew that the arrangement had been made with the sanction and under the directions of the Supreme Government; but as the Governor's Clerk could not be conveniently summoned to verify the copy and the Plaintiff's Agent refused to admit it

this piece of evidence was necessarily rejected. As regards the present case, however, I do not consider it to have been very material. The general practice of native boats carrying such passes being notoriously undeniable and admitted by the Plantiff himself, it is comparatively unimportant, as regards the main question, how that practice came to be established. The object of the pass being clear viz. to protect the bearer from the suspicion of being engaged in piratical pursuits, the absence of such a known credential or the substitution of a forged or inapplicable one must of necessity give rise to suspicion, and if in addition to this there be other circumstances of suspicion strong enough to warrant a reasonable presumption that the party unprovided with such regular pass or attempting such imposition is directly or indirectly conniving at the mal-practices which the system of issuing passes was intended to check, the party has but himself to blame for the inconveniences to which his temporary detention under such circumstances may expose him-of course I do not mean nor can it be supposed that the Government ever meant that the mere

absence of a regular pass or even the production of a wrong one would be sufficient in every case to justify the detention of the party. Circumstances may be infinitely varied. In some cases the grounds for suspicion may be so slight, the absence or irregularity of the pass so naturally acounted for by losses or accidents of different kinds to which seamen are particularly exposed, that any unnecessary detention under such circumstances would justly render the detaining party liable to make ample compensation in damages. The question, there, is, whether the circumstances of suspicion were sufficiently strong to justify the detention complained of in the present case. Now what are the facts? The Plaintiff arrives from Kurow a Port in the territory of Perak and casts anchor off Batoo Kawan, a dependency and within two or three hours sail of Penang, shortly after the arrival there of the Defendant in the Gun Boat in question. The Defendent boards the Plaintiff's boat and enquires for his pass. The demand does not seem to have occasioned surprise nor the defendant's Authority to have been questioned; but he is asked to wait until the return of the Nakodah who had gone on shore,—on his return a pass is produced which purports to be not a pass from the Rajah of Kurow which to this day is neither forthcoming nor accounted for though declared by the Plaintiff's first witness to have been obtained at Kurow, but a pass granted in January 1840 by Mujor Low, the late Assistant Resident at Province Wellesley, to a Chinese inhabitant of Toongal, of a different name from the Plaintiff's and for a different voyage. viz, for one year's trading between Toongal and Penang, and

which had consequently been long expired. The arms moreover, mentioned in this expired and inapplicable pass are found on examination not to correspond with these on board. The defendant after pointing out these causes of suspicion informs the Plaintiff that he shall not detain him, but will for the present deposit one of the arms not men ioned in the pass, viz., a double burrelled gun, with the Panghooloo, or Constable of Batoo Kawan. He has scarcely intimated his determination, however, before, an occurrence takes place which adds so much to the suspicion already entertained as to induce him to alter his first resolution and detain the Plaintiff, his boat and all on board that the matter may be enquired into by the nearest Magistrate, Mr. Ferrier, at Tuloh Remis in Province Wellesley.

It should be observed, by the way, that this course had, in consequence of the irregular pass, and the discrepancy with regard to the arms, been previously recommended by the district Panghooloo, who though a professed acquaintance of the Plaintiff had refused to become security for him to the defendant, and when called as a witness for the Plaintiff on the trial was unable to say more in his favor than that he had known him for a year as a resident at Krian but was not aware of his trading, whilst another of his witnesses declared that for the last 5 or 6 years he had no fixed place of residence being constantly scafaring. But to return; the occurrence referred to which induced the defendant to change his first resolution of releasing the Plaintiff is this, viz., a charge brought against him by the Sub-Renters of the Opium Farm for an alleged breach of the Opium Regulation and a request on the part of the Farmer, that the Opium found on board may be seized and the Plaintiff not released until the charge shall have been heard and decided by the Magistrate. A negotiation then commences between the Plaintiff and his new accuser which occasions a delay of many hours, the Farmer and the Plaintiff endeavouring by entreaties and the direct offer of a bribe (which is rejected with proper indignation) to induce the Defendant to relinquish his hold and (it may be presumed) to become a party to one of those illegal compromises which are notoriously common and which this Court has had frequent occasion to denounce. The intervention of the Panghooloo is again solicited, but he properly refused to interfere, and, as before, recommends the Defendant to take the Plaintiff his Boat and Cargo to the Magistrate, as he accordingly does, first securing the Plaintiff and his party, five other Chinese, with handcuffs, in consequence of some threats and symptoms of resistance. Mr. Ferrier enquires with as little delay as possible into the mat-

ter of the false pass, detains the Plaintiff's arms, and directs the Defendant to curry his prisoners to the Magistr te on this I-land to be prosecuted for the alleged breach of the Opium Regulation. the course of the voyage the Plaintiff endeavours to get rid of the Opium and succeeds in throwing one canister over-board, but this is immediately recovered by the defendant's people, and with the rest secured and safely landed, when the Plaintiff and his party are released from their handcuffs, brought before the Magistrate and bailed until the charge is heard and a conviction takes place, which is followed by a fine and confication of the Opium. all these circumstances together it seems to me that there were sufficient grounds for believing the Plaintiff to be one of those unprincipled freebooters who carry on a double trade of piracy and smuggling, either or both as occasion offers, and that the Defendant was consequently justified in detaining and bringing him and his Boat and Cargo before the nearest Magistrate, Mr. Ferrier, for there the Defendant's responsibility ceased, Mr. Ferrier himself being answerable for the subsequent detention and transfer of the Plaintiff, his Boat and Cargo to Penang, should it be thought advisable to question this authority for so doing.

It was contended for the Plaintiff that this Pass System is an unjustifiable interference with the freedom of trade; an obvious fallacy, since the very reverse is the case—the sole object of the System being the protection of the fair trader and the suppression of piracy. The case of Ab-Dorahim versus Lieutenant Newbold in 1834 referred to as analogous to the present was manifestly and widely different. It was argued also, on the authority of Sir B. Malkin's observations in that case that the Supreme Government has no power to give orders or instructions such as those which occasioned the seizure and detention now complained of. Malkin in the observations referred to rather expresses a doubt than gives any decided opinion with regard to the powers of the Government, nor is it clear whether he alludes to the Local or the Supreme Government, but the two cases are not to be assimilated. If it is meant, however, to be contended, that the Supreme Government cannot lawfully issue general instructions either directly or through the Local Government, to the Marine Police of the Straits, as the Gun Boat Establishment may be denominated, with regard to the seizure and detention of suspected pirates. I do not suppose that such was Sir Benjamin Malkin's opinion. At all events it is not mine. Again it was denounced as no less inconsistent and fraught with hardship and mischief than it was illegal to interfere with the right of Native traders to carry whatever arms

they please for their defence against pirates who are said to be so numerous. But this is another fallacy. It does not appear that Traders are restricted to any specified quantity or description of arms. They are merely required for their own protection to inform the Custom House Officer what arms they actually have on board, that the pass he grants may be drawn up in correspondence with the fact, and thus exempt the bearer from suspicion. Here. however. I may observe that as no further proceedings appear to have been taken against the Plaintiff as a suspected pirate, the further detention of the arms by the Magistrate cannot be justified. and that Gentleman will of course direct them to be immediately restored to the Plaintiff. I may observe also, that the heading of the present form of pass issued at this Port, declaring that Boats unprovided with a similar pass "may probably be destroyed" is decidedly objectionable and ought to be immediately altered and that a short Legislative Act on the entire subject of this arrangement with the Native Rajahs and the powers of the Commanders of Gun Boats would in my opinion be very desirable. Lastly, the Court was much pressed to decide a collateral question with regard to the Opium Regulation, the operation of which (if valid) was said to be confined to the limits of P. W. Island, but which was moreover declared to be invalid as establishing a monopoly unsanctioned by any Charter or Act of Parliament. This question I shall not decide as I consider it to be immaterial to the principal question in the case; because even supposing the Regulation should now be set aside as invalid, the alleged violation by the Plaintiff of this local Act hitherto recognized and acted upon by the Magistrates and people as law and shewn by the Plaintiff's conduct to have been so regarded by himself, would still in my opinion, combined with all the other circumstances of the case have been sufficient to justify the detention of the Plaintiff as a suspected pirate. Nor is the case altered by the fact that the conviction under the Regulation was afterwards quashed by this Court for informality.

In conclusion, considering the candid and direct way in which the case was met by the production on the Defendant's part of various documents and copies of correspondence for the perusal of the Plaintiff's Agent, previous to the trial, it is due to the Government that I should read a portion of one of these documents, though not regularly proved and therefore not now referred to as forming any part of the grounds on which I have already in effect pronounced that the Defendant is entitled to Judgment. It is simply to prevent misapprehension as to the actual views and directions of the Supreme Government than which nothing can be more prudent,

moderate and cautious that I deem it proper to read the following Extract from the document before me purporting to be the copy of a Letter from Mr. Secretary Princep to the late Governor Murchison dated 9th November 1836, viz, "It appears from the letters of the Commissioners dated the 6th and 11th September last, and likewise from the further note of Captain Chads dated the 4th ultimo that the Commissioners do not look upon the necessity of carrying a pass and flag as indispensable to the detection of pirates, on the contrary it seems to be their opinion that Malavan vessels fitted for piratical purposes are easily distinguished by their build and equipment from trading or fishing vessels of the same nation and that it would not be expedient to act upon the principle that Vessels unfurnished with passes and flags should be liable to be destroyed as pirates. It also would appear that the Commissioners have expressed some apprehension that if the System of requiring these distinguishing marks were acted upon rigorously the Scheme would afford to the Authorities of the rival Settlement at Rhio and perhaps to Malayan Chiefs or Superior power the means of vexing honest Traders whose destination might not suit their views and interests."

"The Right Honble the Governor General of India in Council sees in these objections sufficient reason to act with great leniency and caution in the enforcement of the Scheme but is not prepared to abandon the design of requiring Vessels especially armed once fitted out from any Malayan port or Territory to carry the certificate of the Chief that they belong thereto and to bear his flag. It never was His Lordship's intention to apply this principle with such rigour as to prescribe that any vessels not bearing in other respects a piratical character should, simply because not furnished with such flags and documents, be liable to be treated as pirates and destroyed; the utmost in such case contemplated was, that the vessel should be detained until its real character should be ascertained and a pass procured. Much must of course be left to the discretion of the local authorities in the enforcement of a rule of this description and the Officers of this Government especially must be careful by their example to afford to others no plea for the exercise of oppression. It will be necessary to regulate and restrict the power of stopping Vessels on the high seas on the plea of requiring to inspect passes, for this measure if exercised by any but Government Vessels Commissioned for the purpose would be fruitful source of injustice and tyranny. The passes, however, must of course be examined and confirmed at any port the vessel may enter and in this respect the authorities at Rhio as well as those Native Princes would have the power of interfering

with traders, but His Lordship in Council does not consider that this power is calculated to become a source of abuse if the right of stopping and examining in the open seas is confined to known Government Vessels commissioned for the purpose. With this explanation of the views of the Supreme Government on the point, His Lordship in Council commits to you the arrangment of all details for the further prosecution of the Scheme. *Enclosed I transmit copy of a letter from the Governor General of Batavia and of the reply thereto from which correspondence and in particular from the terms of the convention concluded with the Chief of Lingin by the Dutch authorities enclosed in the former, you will perceive, that the Officers of that Government are fully prepared to enforce a similar Scheme amongst the Malay Chiefs subject to their "Authority."

Judgment for Defendant with Costs.

Pia Cherai Buri, alias Pia Buri Rak Po Thon-Plaintiff

vs.

Syed Abbas—Defendant.

Use and occupation or an action for rent lies altho' the lands be situate beyond jurisdiction of the Court. The Statute 11 Geo 2. c. 19, does not extend to the Straits. If a person not lawfuly anthorized acts as Agent for another such act will be considered the act of the 2nd mentioned party, if he adopt and ratify such acts according to the maxim "Omnis ratihabitio retrotualitur et mandato priori acquiparatur." The plea of "Nil habuit tenementis" cannot be pleaded or given in evidence as a defence in an action for rent. Occupation of a part of a piece of land and liberty to occupy the whole, all being at an entire rent, is a constructive occupation of the whole, sufficient to maintain an action for rent for it. If an express contract to let out lands be proved, a constructive occupation or unrestricted liberty to occupy under that contract is sufficient to maintain an action for rent for the whole land. Eviction is no defence to an action for rent unless the Plaintiff, (the lessor) was a party to such eviction,

Judgment

This was an action of indebitatus assumpsit upon an executed consideration, in the common form, the Plaintiff eleclaring as follows; viz,. "That the Defendant on the 1st February 1842 at &c. was indebted to the Plaintiff in the sum of Sp. Drs. 4,200 for the use and occupation of certain Birds' Nest Islands and the right of collecting, appropriating and taking edible Birds' Nests in, at and upon certain Islands, by the defendant and at his request and by the sufferance and permission of the Plaintiff for a long time before then elapsed, had, held, used, occupied, and enjoyed, and also for interest &c." and being so indebted in consideration thereof promised &c. The Defeudant pleaded the general issue.

It appeared in evidence that the Plaintiff, whose real name is Po

Seng, was Rajah of Quedah (as his first appellative Pia Cherai Buri implies) in 1839 and for many years before, and was subsequently transferred by the Siamese Government to the post of Rajah in the Island of Junk Ceylon or Poonga (as is implied in his second titular appellation, Pia Buri, Rak Po Thon); that when Rajah of Quedah, though tributary to the Court of Siam, he exercised an absolute authority over his immediate subjects and dependants and enjoyed or was generally reputed to enjoy among other privileges the uncontrouled right of farming out the Birds' Nest Islands belonging to the territory of Quedah; that his original name was, for all practical purposes, superseded by his official title which alone appeared in all his written orders, contracts and agreements; that on the 18th July 1839, the defendant, a Native Merchant of Pinang, being desirous of renting the Birds' Nest Islands, despatched by the hands of his friends Hadjee Mahomed Ariff and Mahomed Hassan, a letter addressed to the Plaintiff as such Governor of Quedah, in the following "I beg to acquaint you in whom I confide and send to meet you my friends by the names of Hadjee Mahomed Ariff the Son of Hadjee Ahmed and Mahomed Hassan in whom I have confidence to act for me as if I was present myself, they will settle all matters and engagments on my part for me respecting the Birds' Nest Islands, in the Western Bay (Tullo Barat) and whatever agreement they enter iuto on my part, it shall be ratified by me as my own act and deed without any demur, as they being my chosen friends in whom I place the greatest trust, when they arrive in the presence of my friend I trust that my friend will despatch them as early as possible back again to Pulo Pinang and do not detain them unnecessarily because I myself am anxious to meet my friend. have nothing at present worth sending to my friend but a little Oil of Roses and a few pieces of Atlass Chintz-written on the 7th of Jemadalawal Friday 1255." This letter was safely delivered to the Plaintiff who informed the bearers that he received them as the representatives of the Defendant, and negotiated with them as such: and on the 22d of the same month they accordingly affixed their names to a Paper conceived in the following terms, viz., "On Monday the 11th day of the Moon Jemadalawal in the year 1255, (corresponding with the 22d day of July 1839) or in the Eighth Siamese Moon, Tunku Syed Abbas despatched his Agents Hadjee Mahomed Ariff Son of Hadjee Ahmed and Mahomed Hassan to Quedah and they brought his letter and waited upon the Most Honorable Taun Pia Cherai Buri, praying for the farm of the Birds' Nest Isles in the Territory of Quedah; the said Isles amounting to the number of Fifteen and the rent thereof being at Spanish Dollars Four thousand

two hundred per annum. Taun Pia Cherai Buri, was graciously pleased to grant the said Farm according to the prayer of the said Tunku Sved Abbas and likewise gave a Paper of Authority unto the said Tunku Syed Abbas wherein the names of the aforementioned Isles are specified Conditions are, that immediately after the Birds' Nests should be completely collected only one time in the third Siamese Moon (corresponding with the month of February 1840) the said amount Rent should be brought and paid without any objection. If it is not paid according to the said Conditions an Interest should be paid at the rate of one per centum per mensum. In the event that Tunku Syed Abbas should fail to pay the said Rent this Paper should be taken to Prince of Wales Island where he should be sued for the recovery thereof: the said Tunku Sved Abbas being bound to pay all Costs and Charges. This is the Paper executed under the marks of the hands of Hadiee Mahomed Ariff Son of Hadiee Ahmed and Mahemed Hassan and given unto His Most Excellent Majesty Taun Pia Cherai Buri together with the letter from Tunku Sved Abbas, that it may be a voucher. The Witnesses are the undermentioned persons, Toh Shaik Mahomed, Kun Mahomed, Toh Mahomed Shakoff and Toh Hajee."

"(Signed) Hajee Mahomed Ariff,
"Son of Hadjee Ahmed,"

"MAHOMED HASSAN."

The Plaintiff at the same time addressed a letter to the Defendant which was brought to him by his Agent aforesaid and he forthwith despatched his under-tenants or sub-renters in 15 Prows properly equipped to take possession of the fifteen Islands for the Season' which usually lasts about seven months. One of these sub-renters was called who had occupied the Island called Pulo Nemis during the greater portion of the Season, collected the nests and delivered them partly to the defendant himself and partly to his order. ness expressed his thorough conviction that the other Islands, all of which he named, had been in like manner taken possession of and occupied by the Defendant's Agents or sub-renters, and declared that during the continuance of the farm, the right of the Renter or those under him to complete possesson of the Islands and their entire produce of every kind was and always had been absolute and unfettered by any reservation whatever in favor of the Rajah, who did not even consider himself bound to furnish the Renter with the means of protection against Pirates.

It further appeared that, in about two months from the date of the Agreement, the Defendant had paid a portion, 500 Dollars, of the Rent to the Plaintiff's Agent; but on the Plaintiff's translation from Quedah to Poonga, the Defendant under a real or affected apprehension that he could not legally pay to the Plaintiff as Rajah of Poonga the balance of a debt due to him as Rajah of Quedah, wrote to the Rajah of Ligore as the immediate superior Potentate, for derections how to proceed. (See Exbitit D) and that the Rajah of Ligore had in August last declared (See Exhibit E) that the Plaintiff was justly entitled to the balance, although, in the first instance (Exhibit J) he had directed the Defendant to pay it to the present Rajah of Quedah and the Defendant had indeed been authorized by the Plaintiff himself (Exhibit I) to pay it to the Rajah of Ligore should he apply for it; that the Defendant had, nevertheless hitherto neglected and refused to pay the demand or any part of it, and hence the present action.

On the part of the Defendant, various objections were taken, by

his Agent, Mr. Baumgarten.

It was contended in the first place, that the Court not to entertain the action as being essentially local and relating to land beyond the jurisdiction of the Court, which was bound to notice the limits of its own jurisdiction and could not exceed them notwithstanding the Defendant's consent and submission as expressed in the contract which had been put in; and the case of Nemo Multick v. Luchington, Morten's Reports 119, was referred to as in point. It was true the Statute 11th Geo: 2d. C. 19. S. 14 on which the transitory action for use and occupation was founded, was intended to obviate the difficulties in the recovery of rent at common law, but the operation of that Statute was expressly limited to England, and at common law an action of assumpsit for rent was not maintainable, the contract being considered a real contract running with the land, and the only remedies being by distress or action of debt.

In answer to this, the cases of Stevenson v. Lambard 2 East 576 The King against Fraser 6 East 349 and Egler v. Marsden 5 Taun 25 were referred to by Plaintiff's Agent, Mr. Logan, as showing that independently of the Statute, "the necessity of pursuing the oldt remedy of debt for rent and all the strictness required in that form, of action had been got rid of,"—that debt for use and occupation was maintainable as a transitory action founded on the privity of Contract, and not a local action founded on the privity of Estate; and that consequently the present action, which though somewhat differing in form was also founded on the privity of contract, was equally maintainable without reference to the Statute. The argument appears to me conclusive, for the only reason assigned against the maintenance of assumpsit for rent at common law was that the contract was real. But when once the action of debt for rent as on a personal contract was admitted it necessarily followed that assumpsit

was equally admissible, as the most general remedy for the breach of all parol or simple contracts, verbal or written, express or implied; for since Stade's case, 4 Co. 91, it has never been doubted that for a simple contract for a sum certain or for any money demand the Plaintiff has his election either to bring assumpsit or debt; for the maxim debitum et contractus sunt nullius loci applies equally to both. And altho' it was formerly held that assumpsit for rent arrear on a parel lease would not lie, the contract relating to the realty: vet it would appear from the old cases of Dartnal v. Morgan Cro. Jac. 598, Chapman v. Southwick 1 Lev. 204, and Johnson v. May 3 Lev. 150, to have been long ago settled that on the mere promise to pay a sum of money in consideration of the Plaintiff's permitting the Defendant to occupy lands &c., an action of assumpsit was maintainable at common law. Besides, altough it is a general rule that where there was an express contract the Plaintiff cannot recover on an implied one, yet there are many cases in which he may recover on the common Count, though there was a special agreement provided it has been executed; and the present action is on an executed consideration. Nor can there be any good reason for requiring in the action of assumpsit for use and occupation great strictness than in that of debt wherein as appears from the case of Stroud v. Rogers, cited in Wilkins vs. Wingate, 6 T R. 62, the Court of Common Pleas held that a declaration in debt not setting forth any demise of the premises nor for what term, or at what rent they were demised, nor how long the Defendant had occupied them, nor when the sum claimed became due, was yet sufficient to enable the Plaintiff to recover for use and occupation.

It was contended in the next place that the contract was void by the 4th Section of the Statute of Frauds as not having been signed by an Agent "lawfully authorized," within the meaning of that Section, that is to say authorized by Writing under the hand of the Defendant. But it was answered, and I think conclusively, that the Defendant's letter (Ehibit B) was a sufficient written authority; and if not that the defect was supplied by the Defendant's adoption and ratification of the contract according to the well known maxim, "Omnis ratihabitio retrotrahitur et mandato priori equiparatur."

Thirdly it was insisted that the action was improperly brought in the name of the *Plaintiff*, for that the latter was a mere Steward of the real Landlord the King of Siam. And notwithstanding the positive testimony of the witnesses as to the complete independence of the Rajah of Quedah, beyond the yearly tribute of the Bunga Mass or golden flower, it would certainly appear from the Plaintiff's own letter to the Defendant (Exhibit I) that be con-

sidered himself accountable for the Rent to the Court of Siam. But even admitting the superior title of the King of Siam, still, as argued for the Plaintiff, the authorities are numerous to shew that nil habuit in tenementis can neither be pleaded nor given in evidence as a defence in this action, -in other words that the principle is too well established to be now controverted that a servant cannot, in this action, be permitted to impeach his landlord's title.—In the Case of Richards v. Holditch, (cited in Selwyn's Ni: Pri: 5th Edn. 1336) it was agreed by the whole Court " that if any one enjoys a benefit at his request and by permission of another, that is a sufficient consideration for an assumpsit." And it is added "Chapple cited a case as ruled by Lord Hardwicke, where A, without title, gave possession of a house to B: C. the owner, brought assumpsit for the use and occupation but because B, did not receive his possession from C. nor any wise occupied under him, Lord Hardwicke held the action not maintainable by him." The case of Evans vs. Evans, 3 Adolph. cited for the Defendant is not in point, for there the' the tenant received possession from Evans, he recognized him only as the Agent of the real Landlord, Jones, And the case of Balls v. Westwood, 3 Camp. 11. cited for the Plaintiff is conclusive that a Defendant who has received possession from the Plaintiff cannot be permitted to show that the Plaintiff's title has expired unless he solemnly renounced Plaintiff's title at the time, and commenced a fresh holding under another.

A fourth objection was that the occupation had not been sufficiently proved; but it was answered and with reason, that the actual occupation of a part by the Defendant himself or his Agents or under-tenants, (which was clearly proved) and liberty to occupy the whole of the I-lands in question, all being let at an entire rent, was a constructive occupation of the whole, sufficient for the purposes of this action, even supposing that actual occupation of the whole might not be presumed form the evidence which had been given; and that, whether, or not, it was clear (as it certainly is) that an express contract having been proved, a constructive occupation or unrestricted liberty to occupy under that contract was sufficient.

Lastly it was contended that the Defendant had suffered an eviction, and was not therefore liable to pay rent for what he had been prevented from enjoying. The fact of eviction, however, was not proved; the only evidence tendered in support of the assertion being the Exhibits I. J. & K.; the first being simply the Plaintiff's own complaint in a letter to the Rajah of Ligore of certain apprehended trespasses about to be committed on the Birds' Nest Islands by Tuanko Mahomed Saad; the second, being the Rajah's reply, to the

effect that if such outrages should be threatened the Rajah of Quedah would take measures to prevent them; and the third, a letter from the present Rajah of Quedah stating that the alleged trespasses were sanctioned by the King of Siam. This certainly does not amount to proof that the trespasses were ever committed at all, still less that if committed they were sanctioned, as alleged, by the King of Siam .- But even supposing the Trespasses to have been proved and proved also to have been done with the King of Siam's sanction still from the well known case in Aleyn, cited for the Plaintiff. Paradine vs. Jane, where the Defendant pleaded that Prince Rupert had come with an army and expelled him out of possession, it would be clear that the rent was nevertheless due, unless it was also established by evidence that the actual lessor, the Plaintiff, had been privy to the trespasses, and that the Defendant had in consequence abandoned possession. But the evidence is in all these respects too defective for the objection to have any weight.

On the whole then it is clear that Plaintiff is entitled to Judgment for Drs. 3700 and interest with Costs and I think full Costs, as

there was no just ground for resisting payment so long.

1855.

IN THE COURT OF JUDICATURE OF PRINCE OF WALES ISLAND, SINGAPORE & MALACCA.

Between

Lim Seang, Plaintiff,

Plea Side

Jonas Daniel Vaughan, William Ward and William Magness, Defendants.

TO THE HONORABLE THE JUSTICES OF THE SAID COURT.

THE HUMBLE PETITION OF THE PLAINTIFF.

Sheweth,

That your petitioner by John Edward Branson, gentleman, his Law Agent, sues the defendants. For that the defendants broke and entered a messuage and dwelling house of your petitioner, situate No. 8. Bishop Street, George Town, Prince of Wales' Island aforesaid, and sawed off, broke, damaged and destroyed divers wooden fences or rails or barricades erected, put up and affixed to and in the first or ground floor of your petitioner's said house; your petitioner and his family being then in possession of the said house, and seized and took away the same and converted the same to their own use.

And your petitioner claims 40 Spanish Dollars and costs of suit and prays that the defendants may be Summoned to appear in this Honorable Court and defend the said claim so that justice may be done as the case shall require and your petitioner will ever pray.

(sd) J. E. Branson.

Plaintiffs' Law Agent.

IN THE COURT OF JUDICATURE OF PRINCE OF WALES' ISLAND, SINGAPORE & MALACCA.

Between

Lim Seang, Plaintiff,
and
Jonas Daniel Vaughan, William Ward
and William Magness, Defendants.

The defendants in person say, that they are not guilty as alleged. And for a further plea, the defendants say that before and at the time of the alleged trespass there was, and of right ought to have been a certain common and public way on foot, commonly called the "five feet pathway," into, through, over and along the said messuage and house of the plaintiff, running parallel with the common and public highway there, for all the liege subjects of our Lady the Queen to go, return, pass and repass on foot at all times of the year and of their free will and pleasure and that the alleged trespass was a use by the defendants of the said pathway.

Filed and annexed this 9th day of January 1855

(sd) J. D. Vaughan. (sd) Wm. Ward. (sd) Wm. Magness.

17th Jany.
1855. The Plaintiff takes issue on the defendants first and second pleas.

(ed).J E. Branson, Plaintiff's Law Agent.

Judgment.

Afterwards, on Thursday the 1st February 1855, in open Court before the Hon'ble Sir William Jeffcott, Knight, Recorder, came the plaintiff by his Law Agent and the defendants in person, and all and singular the premises being seen and heard, it appears to the Court that the defendants are not ginlty of the trespass within laid to their charge. Therefore it is considered by the Court that the plaintiff do take nothing by his petition, and the defendants do recover against the plaintiff the costs by them laid out, in and about their defence in this behalf here adjudged to them &c and that they have execution thereof.

(sd) A. Rodyk,
Senior Sworn Clerk,
for the Registrar.

Penang Gazette 16th. October 1858.

Before Sir P. Benson Maxwell, Knight, Recorder.

(9th. October 1858.)

Adley v. Robertson.

The petition stated that the Defendant had assaulted the Plaintiff, removed him from the Church, and imprisoned him in the Police Court.

The Defendant, the Deputy Commissioner of Police pleaded not

guilty by Statute (Act XIII of 1856.)

Plaintiff-I am a Master Mariner, and I came here on purpose to have my children baptized. I applied on the 28th September to Mr. Wallis to baptize them. Last Sunday, the 3rd, I proceeded to Church at 101 A. M. with two ladies taking the infants. After five minutes, in consequence of something I heard, I left the Church, went round, and met Mr. Robertson near the vestry room. I said to him, "I hear you have constables here to turn me out of Church if I should proceed up to the font?" He replied "yes." We then went into the vestry room together, Mr. R. said to Mr. Wallis, if it is agreeable to you to baptize the children in the evening, Mr. Adley will wait till then. Mr. Wallis replied he would not baptize the children and ordered me out of his private vestry. I replied "Mr. Robertson brought me here" and then went out. I said to Mr. R. before you take me prisoner, when I go to the font let me address a few words to the congregation. I went into Church and remained in my pew till after the 2nd lesson. As it concluded, I walked up to the reading desk, and said to Mr. Wallis "I wish you to baptize my infants." (Here the plaintiff put in two letters from himself to Mr. Wallis, and a letter from Mr. W. to him). Mr. R. rose from his pew at the same time that I Immediately on my speaking to Mr. W., Mr. R. tapped me on the shoulder and asked me to go to my pew. I walked back a few steps, when I turned my head and saw the two ladies with the infants in their arms standing at the font. I turned round and walked towards them, intending to request them to retire, and was then taken prisoner by Mr. R. After I had taken half a dozen steps, he seized me by the arm or collar, and pushed me along. When I got towards the door I said " I merely asked the clergyman to baptize my infants." When I got outside Mr. R. gave me in charge to a constable for three minutes. He returned into Church and came out again, when he put me into his carriage and took me to the Police Office and kept me there for about ten minutes, when Dr. Scott came and bailed me out.

Cross examined.—On leaving the vestry I felt convinced Mr. W. would not baptize my children. Mr. R. did his best to induce Mr. W. to baptize the children in the evening. When I spoke, service was going on. Mr. Wallis was shutting the Bible when I spoke. There might be an interval of about 3 seconds between the end of second lesson and the beginning of the singing. I did not say before the service to Mr. R. that I was determined to address the congregation though it should cost me 1000 Rupees. I only asked Mr. R. to let me address the congregation. I walked before Mr. R. when he took me prisoner. I think he held me by the back of my coat collar. I did not give Mr. W. any list of sponsors or any notice who they were to be. I did not enter my pew after I first left. The ladies stood to the right of the fout. I had Godfathers and Godmothers ready. I was to be one.

The Judge.—You were not aware, I suppose, that the canons do not allow a father to be the Godfather of his child.

Dr. Scott.—I was in Church on the 3rd and was one of the sponsors. I had been in my pew only a few minutes, when I received a message from Mr. Robertson. I at once went out to him. asked me if I was one of the sponsors. He said "I advise you to proceed no further in this matter, I have two European Constables here, and if you proceed I will take you prisoner." I told him if he did so that he would exceed his authority. He stated that he was acting under the authority of the Resident Councillor, and that he would take me prisener. I said "I'll be hanged if you do; you shall not, if I can possibly help it, take me prisoner in Church." Mr. Robeston said that as it was Communion Sunday it would be inconvenient to proceed with the Basptism, and he went to the vestry with the plaintiff. Shortly after, Adley returned from the vestry and sat down in front of me. As the last words of the second lesson were being read, he walked up to the reading desk, and in a low tone of voice said, "Will you baptize my children, Mr. Wallis," or words to that effect. Mr. Wallis looked down at Captain Adley as he addressed him, but made no reply. As Captain Adley proceeded to the desk, Mr. Robertson followed him, put his hand on his shoulder, and walked with him down the aisle. While he was walking down, the ladies came up to the font. I heard one of the infants cry, when the plaintiff turned round and walked some steps towards the font. Mr. R. immediately seized him by the arm, turned him round with some force, and either by pulling or pushing, got him out of Church; bundled him out of Church. Ten minutes afterwards I went to the Police Office, and bailed the plaintiff. He was in the guard room.

Cross examined.—The organ was playing the symphony when plaintiff addressed the clergyman. Plaintiff did not speak a second time. He walked forward respectfully and quietly. I don't know whether the congregation was disturbed. I was, but it was not by the plaintiffs' act, but by seeing him dragged out of Church by the Police.

Mr. Presgrave.—I was in Church on Sunday last. At the end of the second lesson plaintiff walked from his pew to the reading desk, and he appeared to address some words to the minister, but I did not hear what they were. As he spoke, I saw defendant approach him and take him by the arm and lead him down the aisle. By the time they were half way down I saw two ladies at the font. Plaintiff turned back and moved up towards the font. He was prevented, I can't say by whom, I thought I saw two or three Police uniforms near him. He was taken hold of by one of them and put out of Church.

Cross axamined.—When he walked up, the congregation were not standing up, nor were they when he addressed the Clergyman.

Mr. Alexander.—Police Magistrate. I was in Church on the 3rd instant. I saw plaintiff walk up the aisle and say something to the clergyman, what, I know not. Defendant was sitting in the same pew as myself. As plaintiff passed up, defendant opened the pew door, and followed him, I saw nothing as I purposely avoided doing so. Plaintiff—Did you not give the defendant some advice? Mr. Alexander said he would rather not state what he had said. The Judge held he was bound to answer the question.

Mr. Alexander.—I advised defendant to let the plaintiff address

the clergyman and await his reply, and not to be hasty.

Captain Mitchell 22. M. N. I.—I was in Church last Sunday morning. After the second lesson, my attention was attracted by a voice at the font. I saw plaintiff standing; I did not hear any thing said. I saw defendant address him, and both turned round and walked down the aisle. Two ladies came in, each bearing a child. They went up to the font Mr. R. spoke to them, and they returned to the room from where they had come.

Mr. Leonowens.—I was in Church. At the end of the second lesson, I saw plaintiff leave his pew and walk towards the reading desk. He arrived there at the close of the lesson. Defendant left his pew at the same time, and followed plaintiff. I heard plaintiff ask the clergyman to baptize his infants. Defendant at once laid his hand on him, both turned round, Plaintiff walked towards his pew, when he arrived there, I saw him turn round again towards the font, and there I, for the first time, observed two ladies,

each carrying an infant. The plaintiff advanced towards them, but before he had proceeded far, defendant stopped him, put his hands on him, and turned him round. When opposite to my pew, plaintiff seemed to take firmer hold of the ground, as if indisposed to proceed; and Mr. R. then moved him forward with some force. As they passed, plaintiff said 'I merely came to have my children baptized."

Cross examined.—I had no idea there was to be a scene in Cuurch.

Mr. John Rodyk.—As I was about to walk in to Church on Sunday last, I met defendant, who said to me, "Well, Uncle, here I am to keep the peace between the Parson and Dr. Scott." "No" said I, "you have got the cow by the tail, if there is anything afoot, it is about the Captain having his children baptized." When in Church at the end of the second lesson, I saw plaintiff walk up to the reading desk and say something, when Mr. Robertson went up to him and said "come." Plaintiff walked back. So did defendant: After returning to his pew, plaintiff went up a second time in the direction of the clergyman. Defendant followed, collared him and then marched him out of Church.

DEFENCE.

Defendant .- On Sunday morning last I received a communication from Mr. Wallis, in consequence of which I went to the Church. I saw plaintiff in the Church yard, he said he intended to present himself before the congregation and publicly demand of Wallis to baptize his children, as that was the only course left to He further said it was laid down in the Prayer Book that he should present the children at the font, otherwise he would have no ground of complaint against Mr. Wallis, for he intended to carry the matter out, and he had been advised to take this as the regular I asked plaintiff to accompany me to the vestry, and I would try to persuade Mr. Wallis to break through his rule and bantize the children in the evening. On this, plaintiff came with me to the vestry, I told Mr. Wallis plaintiff was determined to interrupt the service by speaking to him, and that as the congregation would be thereby disturbed I asked him to baptize the children in the evening. He replied he would not break through his rule, and ordered plaintiff to leave his vestry. I remained behind and told him there would be a disturbance, and begged of him that he would call on me from the pulpit if he considered it necessary to remove plaintiff. He replied "I will not stop the service. I call upon you now in your official capacity to prevent the disturbance." After leaving the vestry, I went into Mr. Alexander's pew and saw plaintiff sitting about the middle of the Church. I saw a number

of ship captains and strangers in Church, looking about and apparently excited. I saw that something was going to take place. Previous to this I had ordered an Inspector to remain at the Church door. After the second lesson, before the parson had closed his book, plaintiff went forward at a rapid pace to the reading desk and said to Mr. Wallis something about wishing to have his children baptized. Mr. Wallis seemed perfectly confused and disturbed. He looked at plaintiff, then at the gallery, then at his book. Plaintiff stood at the desk 2 or 3 seconds apparently waiting for an answer, I walked up to him and said "you must go back to your pew." He at once did so. I returned to mine. As I put my hand on the door to open it, I saw plaintiff walking up again. I went towards him again and said "now go back to your pew." He hesitated : when I immediately, took him by the left arm and turned him round. As he appeared unwilling to go: I put my hand on the small of his back and pushed him before me. Before I reached the steps of the Church door Mr. Leonowens and all the strangers had left the Church.

Cross examined.—Previous to Divine Service, in talking with plaintiff, he said he was determined to address the congregation, and that he would do so if it cost him 1000 Rupees. "I have not," he said," lived in Calcutta 12 or 14 years for nothing; and if it should cost me 1000 Rupees, I shall address the congregation and have the matter put to right." Having heard this, I concluded, when I saw him go forward a second time, that he was going to address the congregation. When he told me he would speak; he spoke in a very determined tone.

The Reverend A. W. Wallis.—Seeing a person approach me, I felt the usual routine of Divine Service interrupted and felt accordingly. In consequence of the plaintiff's conduct I was obliged to postpone the Holy Sacrament of the Lord's Supper. I was directed by the late Bishop of Calcutta, in order to promote as much as possible the Baptism of children, to appoint one Sunday in four for that purpose.

The Judge.—Do the Bishop's instructions contain any negative

words, prohibiting baptism at other times ?

Mr. Wallis.—I am not precluded from baptizing on any of the other Sundays or holidays; and am always ready to do so when there is any necessity. But I have a discretion in determining whether the necessity existed or not in every case. The first rubric prefixed to the service for private baptism lays it down that parents are not to defer baptism, "unless upon a great and reasonable cause, to be approved by the curate." This give me an ab-

solute discretion in fixing the day for baptism.

Mr. Clarke. - I conduct the music. After the second lesson, as soon as the Clergyman said "here endeth the second lesson." I immediately began the music. We make a point of always starting the music as soon as the minister says "here endeth the second lesson." I understood there was to be a scene in Church. fore stood well forward in the gallery on purpose to see what would take place. Before the clergyman had finished the second lesson. plaintiff stood up with his hat in his hand, and opened his paw. He then walked up to the reading desk in a very bold attitude, and appeared to address the minister. He stood for some seconds while the chanting was going on Then Mr. Robertson came up to bim and touched him on the shoulder, when plaintiff turned and went almost into his pew. As he was about entering two ladies, each carrying an infant, came from a side room and stood at the East sideof the font. Plaintiff turned and went back not in the direction of the ladies, but of the clergyman. He had not reached his apparent destination, when Mr. Robertson seized hold of him by the arm, apparently with the intention of walking him out of Church. Plaintiff at one time leant his body back, when defendant used a little force in pushing him down the aisle.

Cross examined.—Special instructions were given by the Clergyman to commence the music immediately after the ending of the second lesson.

THE RECORDER in delivering judgment observed that in the view which he took of the facts of the case, he was relieved from the necessity of deciding whether plaintiff's act of going up to the reading desk at the end of the second lesson and calling on the clergyman to baptize his children was "a disturbance of an assembly engaged in the performance of religious worship," within the meaning of the 41st. Section of the Police Act, which visited that offence when committed intentionally and without lawful excuse, with a fine that might amount to 500 Rupees, or imprisonment which might extend to six months. If it had been necessary to decide that point, he should have taken time to consider his decision, as he felt some doubt whether the Act applied to such a case. The Section in question was in substance borrowed, though its language was much abridged, from the Toleration Act, and from the more recent Statute of the 25 Geo. 3; and it occurred to him as perhaps doubtful whether it was intended to regulate the internal police of religious assemblies and the government of the individual members composing them; or whether its object was not rather merely to protect such assemblies from insult and annoyance on the part of persons unconnected with them. The English Acts he had referred to were evidently intended, primarily at all events, to protect dissenters and others whose forms of worship were tolerated by law, from molestation in times when the spirit of intolerance was more generally prevalent; and he should have hesitated to hold, without further consideration, that the Indian Act which followed them, applied to an irregularity committed in a religious assembly by one of its own members, especially when committed, as had probably happened in this case, in the bona fide belief that it was strictly regular and right.

In a case which had occurred in England, Lord Tenterden in giving the judgment of the Queen's Bench, expressed a doubt whether the Toleration Act applied except where the thing was done on purpose to disturb the congregation or misuse the preacher; and he (the Recorder) was sorry that he was not called upon to decide whether that doubt was wellfounded or not. '(He here referred at some length to the case of Williams v. Glenister, 2 B & C.)

But the question did not arise upon the facts before him. Before adverting to them, however, he felt bound to say, and he was sorry to say it, that he saw little to commend in the conduct of any of the parties concerned. Whatever rule the clergyman might have laid down respecting the time for administering baptism under ordinary circumstances, it was quite clear that in strict right the Plaintiff was entitled to have his children christened on the day on which he had requested that the ceremony should be performed; and he thought it much to be regretted that his request had not been complied with. The 68th Canon-and the Canons were held by the clergy to be binding on them, although they were not so on the laity as they had never received the sanction of Parliament-required a clergyman, under the penalty of three months' suspension, to christian children upon "convenient warning" being given to him; and what was a "convenient warning" was settled by the third rubric prefixed to the service for public baptism, which directed that "where there are children to be baptized, the parents shall give knowledge thereof over night or in the morning before the beginning of morning prayer to the curate. " The only discretion which the latter had in the matter was in choosing whether the children should be baptized at morning or evening prayer. The first rubric to the private baptismal service, to which Mr. Wallis had, in his evidence, referred, certainly gave no countenance to the rule of holding buptisms once a month only, for it directed the curate to admonish his parishoners not to defer baptism beyond the first or second Sunday after birth. It was not for him (the Recorder) to say whether it was absolutely necessary that clargymen should

abide strictly in all cases to the directions of the rubries; but certainly the plaintiff appeared to him to be entitled by them to have his children baptized on the Sunday in question; and whatever rule the chaplain might have laid down on the subject in ordinary cases he must say he thought it hard under the peculiar circumstances of the plaintiff's case; his having come here on purpose to have his children baptized, and being kept here from his ordinary pursuits for no other purpose—that he had not departed from it, and followed the course prescribed by the Prayer Book.

However, even if the clergyman was ever so wrong, he thought that the plaintiff had not done much to put himself in the right by the course he had adopted. It certainly was not a very right or a very proper means of redressing himself for the default of the clergyman, to get up a scene in Church. If he had a just cause of complaint against the Chaplain his remedy plainly was to represent his condouct to his Bishop, and not to go off to the Church for the purpose of addressing the congregation and interrupting the service, -especially, too, on a Sacrament Sunday, when people's minds ought least to be troubled by a scene likely to excite angry feelings. He might, possibly, have been advised that it was necessary, in order to complete his case against the clergyman, to present his children at the font for baptism; but surely his common sense might have told him that he was dispensed from going through any such formality by the direct and point blank refusal which he had received from the chaplain, both in writing on the Saturday, and verbally in the vestry room before the beginning of the morning service on the Sunday. The defendant, also, had been in the wrong, for in his (the Recorder's) opinion the plaintiff's conduct which was the cuase of his apprehension had not in any way justified his being taken into custody. The facts of the case-and there was substantially no dispute about them-were shortly these:-The plaintiff walked up the aisle to the reading desk, and called upon the clergyman who was sitting there, to baptize his children. He had hardly uttered the words, when the defendant requested him to return to his pew, which he did immediately and without hesitation or remonstrance. So did the Defendant. If, then, this anneal to the clergyman constituted the disturbance, all that could be said was that the disturbance was then over. The plaintiff had desisted; the detendant had not arrested him; and there was an end to the matter. But just as the defendant was re-entering his new he observed the plaintiff walking up the aisle again, and without waiting to see what he was going to do, at once seized him and carried him prisoner to the Police Office. Now it was impossible

to contend that a person was guilty of disturbing a congregation who merely walked up the aisle of the Church in which they were assembled. He was aware that one of the Canons forbade walking and talking in Church, and probably at Common Law's person might be removed for so misconducting himself. But then the walking there contemplated was something very different from what had occurred in the present case. The Canon was directed against the irreverent conduct which, he believed, was common enough in Churches, before the Reformation, and after it too; and which grossly interfered with the decent celebration of Divine Service. It was known for instance, that the nave of St. Paul's was long used as a thoroughfare, and that people used to walk about even in the choir with their hats on, during Divine Service. This was the kind of walking which not only the Canons, but perhaps the Common Law also prohibited; but it was something wholly different from the conduct of the plaintiff at the time of his apprehension. What his motive was in returning towards the font was uncertain; but it was also immaterial. If he was going merely to say privately a few words to the ladies who held his infants, surely there was no impropriety in his doing so, and certainly no disturbance of the congregation-nothing therefore which could have warranted his apprehension. If, on the other hand, he was returning to carry out the intention which he had expressed of addressing the congregation, then the defendant had probably good reason to regret that he had not taken the sound advice given him by Mr. Alexander not to be "too hasty." He was "too hasty." He arrested the plaintiff, not because the latter had committed any offence, but in the apprehension that he was perhaps' about to commit one. He was wrong, therefore, and the plaintiff had a good cause of action against him.

The only remaining question was what damages the plaintiff ought to recover. He observed that they were laid low in the petition, and he thought that the plaintiff had acted wisely in so laying them. After his declaration that he intended addressing the congregation in the middle of the service, he was hardly entitled to come into Court and ask for heavy damages. Indeed, it was not improbable that he had brought the action rather for the purpose of establishing in Court that he had done nothing to justify his arrest then for getting damages from the defendant. With his motives or object, however, he (the Recorder) had nothing to do. He was simply to assess what sum ought to be paid under the circumstances; and he thought that while the plaintiff was not entitled to very heavy damages, they ought to be more than nominal in order to teach Police Officers to be careful how they interfered with the liberty of

the subject. He would therefore give judgment for the plaintiff, damages 20 Dollars.

(Exhibits.)

Captain Adley's compliments to the Revd. Mr. Wallis and will feel very much obliged by him giving a decided answer as to whether he will baptize his two infants next Sunday as he proceeds to Calcutta sometime next week and wishes to be present at the christening.

Thursday, 30th Sept. 1858.

Dear Sir.

I have been obliged to make it a rule, in order to avoid the too frequent reputition of the Baptismal Office, generally to administer Baptism only on the last Sunday in each month. And as I have recently, I fear, caused some feeling which I had rather have had avoided by my adherence to that rule. I need be careful now, lest I seem to show preferences which I have no right to do.

Had you been about to take your infants on board ship with you, I should not have hesitated to baptize them next Sunday. In that case, there would have been an urgent reason for my diverging from the usual practice. But I cannot help feeling the case to be much altered when, should I diverge from that practice, I should do so merely to meet, your own proper desire to be present at your children's baptism. For, however proper your desire, your presence is by no means essential, and I should have constant occasions to change the season, did I do so to meet this or that wish on the part of the parents, and should moreover involve myself in all sorts of animosities, did I meet the wish of one in a matter not essential, and refuse to meet the wish of another.

On this ground and after full consideration, I am afraid I cannot consistently concede your request. At the same time I do assure you that I feel very sorry that your circumstances are as they are. October 1st, 1858.

Believe me.

Yours faithfully,

Arthur W. Wallis.

To The Reverend A. Wallis. Sir.

I beg to inform you that I wish to have my two children baptized to-morrow (Sunday) as I purpose leaving for Calcutta during the course of next week and naturally desirous of being present at their Baptism. In a private letter which I have received from you, you state that you have made it a rule not to administer the Sacrament of Baptism except on the last Sunday of the month and that you are compelled to decline acceding to my wishes, to the

rule instituted for the convenience of the congregation, I would offer no objection were I remaining here, but as I am obliged to leave next week, I conceive the circumstances under which I am placed entitle me to an exception to that rule. You are aware that my wife died lately during my absence, and having only come here to settle my affairs and have my children admitted into the Church, of which I am a member, I think it extremely hard, that I should not have the gratification of being present during the ceremony. I now beg to give you official notice, that I shall be at Church tomorrow forenoon and shall present my children for Baptism in due form, I shall demand this as my right and however unwilling to create any interruption to the morning service I feel that I would be wrong in waiving what I consider my undoubted right, with you shall remain the responsibility of refusal.

2nd. October, 1858.

'I am, Sir, Your Obdt, Servant. William Adley.

Penang Gazette, 9th April 1859.

Before Sir P. Benson Maxwell, Knt., Recorder.

The Law of England in Penang, Malacca and Singapore.

REGINA v. WILLANS ESQUIRE.

The Judge.—The is a rule calling upon the Police Magistrate of Province Wellesley to shew cause why he should not hear and adjudicate upon a complaint preferred by Mr. Duncan Pasley against one Chivatean, an agricultural labourer in his employment, for having absented himself from his service.

It appears from the affidavit upon which the rule was granted, that Chivatean was sentenced last December, by the former Magistrate of the same place, to two months' hard labour in the House of Correction for a similar offence; that upon the expiration of that term, "he did not and would not return to the said service," and that he was thereupon again apprehended and brought before Mr. Willans, who "refused to adjudicate on the second complaint, on the ground that the jurisdiction given to him by the Act of Parliament, 4 Gro. 4 c. 34, had been exhausted by the previous conviction and punishment aforesaid, and that he could not punish the said Chivatean for a fresh absenting upon the same contract."

The question raised upon this state of fact is whether the Magistrate's refusal to adjudicate was well founded. Before expressing

any opinion upon it, however, it is necessary to determine whether the Statute under which the defendant was called upon to act, did give him any jurisdiction, as asserted in the affidavit; that is, in other words, whether it is part of the law of this Settlement. This question has never been decided in this Court, although the Act has been enforced by the Magistrates for many years past; and its decision depends, first, on whether any part of the Statute law of England of as recent a date as 1823 is in force here; and if it is, then, secondly, on whether this particular Act is, from its nature, applicable to this country.

How, and to what extent the law of England first became the law of the Indian Presidency Towns, and incidentally, of this Settlement, has been the subject of much discussion. Sir B. Malkin laid it down, a quarter of a century ago, that "the introduction of the King's Charter into these Settlements had introduced the existing law of England also ... and had abrogated any law previously ex-"sting" (a). The same doctrine had long before been that of the Indian Supreme Courts, with respect to the introduction of English law within their respective jurisdictions; and no stronger proof of the firmness with which it was established here can be cited, than the case in which Sir B. Malkin applied it: for though he expressed a strong doubt as to its soundness in principle, he acted upon it in a case where its effect was to abolish the law of Holland in Malacca. and to substitute the law of England in its stead. If this doctrine, could now be disturbed, it could not be in this Court, where it must be treated as beyond the reach of controversy. But as it has been disputed, since Sir B. Malkin's judgment, by the Indian Law Commissioners, and, before them, by Master Stephen in his report in Freeman v. Fairlie, and has been sometimes questioned in local discussions in the Settlement (b), it may be as well to consider on what grounds it may justly rest. And as the learned judge who laid it down, stated it to be subject to exceptions which he left undefined, it is advisable, at the same time, to examine whether it is subject to any and what exceptions or qualifications.

Having regard to the circumstances under which this place became a British possession, it may be doubted whether any, or if any, then what body of law ought de jure to have been considered at the time of the establishment of the Colony, as its lex loci, that is, as the territorial law applying to all classes of its inhabitants indiscriminately, without distinction of race, creed or nationality. The general rule of law determining what is the law of a territory, is, that

⁽a) In the Goods of Abdullah, Morton's Rep. 19. (b) See ex. gr. two articles in the Penang Gazette of the 8th August and 24th October, 1857.

British subjects and occupied by them, the law of England, so far as it is applicable (a), becomes, on the foundation of the Settlement, the law of the land (b); but that if it be an inhabited country, obtained by conquest or cession, the law in existence at the time of its acquisition continues in force, until changed by the new Sovereign. In the one case, the settlers carry wish them to their new homes, their laws, usages and liberties, as their birthright Iu the other, the conquered or ceded inhabitants are allowed the analogous, though more precarious privilege of preserving theirs, subject to the will of the conqueror.

.This Settlement, however, did not fall exactly under either branch of the above rule. It was neither a Colony of British subjects, in the ordinary sense of the expression, nor can it be said to have been an inhabited country when ceded, because four Malay families were found encamped upon it, when it was first occupied by us, (c). It was a desert Island belonging to the Rajah of Quedah, and ceded by that prince in 1786 to an English corporate body, which was invested with quasi sovereign-powers over territories in its possession, but which it held in trust for the British Crown. Indeed, it was once considered to be not free from doubt whether the sovereignty of the Island was ever ceded (d). Mr. Light and the body of Marines who first landed here came, not as British colonisers of a desert Island, but as a garrison to take possession of a ceded territory; and assuming that they were strictly British, and that they brought the law of England with them, yet, having regard to the temporary nature and object of their inhabitancy here, that law, can hardly have been made the lex loci by them, but was only the personal law of the garrison and their followers (e). The bulk of the first settlers were Chinese, Malays and Chulias, (f) who, obviously, could not establish their respective laws in a British possession as the lex or the leges loci; and the few Englishmen who established themselves here at the foundation of the Settlement, came, not as men assuming the dominion of a desert land, and settling on it as a matter of right, but as strangers permitted as a matter of favour, to dwell in a country belonging to a quasi foreign power, with the government of which they had no concern. Mr. Light, the first Superintendent, was instructed to admit into the Island only such colonists as he thought it safe and

⁽a) 1 Bl, Comm. 107. (b) 2 P. Wms. 75. (c) 5 Journ. Ind. Archipelago 409. (d) 5. J. Ind. A. 295. See the terms of the cession in 2 Ind. A. J. tr. New Series p. 189. (e) See Lord Ellenborough's judgment in R. v. Brampton, 10 East 282, 288. (f) 5 J. Ind. A. p. 9.

advisable to admit (a); and it can hardly be contended that the handful of Englishmen who were allowed to establish themselves here under such circumstances, and whose right to reside without the express license of the Company was more than once disputed (b), were such colonists as carry their laws as their birthright to their new homes. The Governor General in Council, it is true, had power to make Ordinances and Regulations for the government of the place (c), but the power was not exercised in declaring English or other law to be the lex loci; and the Crown and Parliament remained equally silent.

Again, Penang being, at the time when it became a British possesion, without inhabitants to claim the right of being governed by any existing laws, and without tribunals to enforce any, it would be difficult to assert that the law of Quedah continued to be the territorial law after its cession. Such a doctrine would imply that the continuance of the existing law in a ceded or conquered country was the right, however precarious, of the late sovereign or of the soil itself, rather than the privilege of the inhabitants. But the case of Jamaica, referred to in Campbell v. Hall (d), shews that this is not so. Though taken from the Spaniards, Spanish law was not considered in force there, after all the Spaniards had left the Island. When an inhabited or conquered country is ceded, the new sovereign impliedly undertakes to administer the existing laws among his new subjects, until he changes them; but it does not follow that when the country is a desert, he is to be presumed to undertake that he will enforce the laws of the former sovereign when settlers shall afterwards arrive. Another objection to the continuance of the former law would arise, in this case, from the nature of the Mahometan law, which is the law of Quedah. Lord Coke laid it down in Calvin's case (e) that "if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, then ipso facto the laws of the infidel are abrogated;" and although Lord Mansfield treated this proposition as absurd, the Indian Law Commissioners are well justified, I think, in asserting that "a system of law which according to its own principles, can only be administered, by Mahometan judges and Mahometan arbitrators, upon the testimony of Mahometan witnesses, is not a system which can devolve ipso jure, and without express acceptance, upon a government and people of a different faith" (f), It seems to me impossible to hold that any Christian country could be pre-

⁽a) 5 Ind. A. J. p. 114. (b) Minute of Mr. Phillips on the landed tenures of P. W. I. p. 2. (c) 13 Geo. 3 c. 63 Sect. 36. (d) 1 Cowp 212. (e) 7 Rep. 17 b. (f) Rep. on Petn. of East Indians and Armenians.

sumed to adopt or tolerate such a system as its lex loci. In such a case, according to Coke, "until certain laws are established, the King by himself, and such judges as he should appoint, should judge the inhabitants and their causes according to natural equity, in such sort as Kings in ancient times did with their kingdoms, before any certain Municipal laws were given, as before hath been said "(a) or, more probably, according to the third resolution of the Privy Council (b), English law would at once come in force—the only natural equity known to English Sovereigns and English Judges.

But whatever ought, de jure, to have been the law of the land when the colony was founded, it is clear beyond all doubt, that for the first twenty years and upwards of its history, no body of known law was in fact recognised as the law of the place. As to the law of England, so far was it from being regarded as the lex loci, that it was hardly recognised even as the personal law of its English inhabitants. This appears very clearly from the early records of the Local Government which were published a few years ago in the Journal of the Indian Archipelago, under the title of "Notices of Penang." by a gentleman holding a high office in the Settlement. In the first place, the law of England was not in force for the punishment of crime. Mr. Light was directed in 1788 " to preserve good order in the Settlement as well as he could," not by punishing those who offended against it, according to English or any other known body of law, but "by confinement or othe" common punishment" (c); and five years later he is found carrying out his instructions by "whipping and confining to the public works, or sending off the Island" "the thieves, housebreakers and other disorderly persons" who he complained, then infested the island (d). But this jurisdiction extended only to those inhabitants who were not British subjects (e). These, it appears, he was ordered, at least in cases of murder, to send to Calcutta for trial before the Supreme Court there (f). But when, in 1793, a man named Sudds was accordingly sent there on a charge of murder, Sir W. Burroughs, the Advocate General, gave it as his opinion that "there was not any law by which the well meant directions given to the Superintendent of Prince of Wales' Island . . . could be supported, as far as they related to the trial or punishment of murder, or any other crimes, at that Island" (g); for the jurisdiction of the Supreme Court of Calcutta was then confined to Bengal, Behar and Orissa (h). When it was extended by the 39 and 40 George 3, C. 76. §. 20, to all factories

⁽a) Calvin's Case, 7 Rep. 17 b. (b) 2 P. Wms. 75. (c) 4 J. Ind. A. 643. 5 J. Ind. A. 294 (d) 4 Id. 656. (e) Id. 643. (f) 5 J. Ind. A. 2, (g) 5. J. Ind. A. 5. (h) 13 George 3. c. 63. § 14.

and places subject to the Bengal Presidency, fresh instructions were sent (25th March, 1800,) to Sir George Leith the Lieutenant Gover. nor of the I-land, directing that Europeans guilty of murder or other crime of enormity should be sent to Fort William (a); but for lesser offences, they appear to have been left in total impunity. As late as 1805, the Governor complains that while provision had been made for the punishment of native criminals, "the more turbulent European remains on the Island free from all restraint, with the power of committing every act of injustice and irregularity towards his neighbour and the most peaceable native, having set at defiance all authority as not legally established on the Island "(b). It may be said that this proves the want of legally constituted Courts, rather than the absence of law; but criminal law can hardly be said to exist where there are no tribunals to enforce it. However this may be, what criminal law was in force was not English law. In 1794, a body of Regulations were passed by Lord Teignmouth, the Governor General for preserving the peace of the Island (c); and these appear to have continued in force, and indeed to have been the only criminal law in force, down to the time when the first Charter was granted.

Next, the law of England was as little recognised in civil matters. Even the general rules of inheritance, which Blackstone considers to be among those portions of English law which are carried to their Settlements by English settlers (d), were wholly disregarded. Mr. Dickens, who was appointed in 1800, partly to act as Judge or assessor to the Lieut. Governor (e), and partly to frame a Code of laws for the Settlement (f), urged earnestly, in that year, that the Governor General should enact a Regulation upon the subject (g); and even as late as 1823, we find Mr. Phillips, the Governor of the Settlement, mentioning that "the rules which, according to British law. govern the disposition and inheritance of real property have never been applicable to our lands," &c. (h). So, with respect to personal property. In 1804 Mr. Farquhar, the Lieut. Governor, in applying to the Supreme Government for instructions for the distribution of the effects of a person domiciled in the Island, who had died intestate. stated that there was here "no law nor any fixed custom," according to which it could be distributed (i). Again, slaves were bought and sold, not only openly, but with the sanction of the Local Government, one of whose early cares was to provide Registers for those transactions (j); and taxes were imposed by the sole authority of the Governor General in Council, viz. a duty of 2 per cent on all

⁽a) 5 J. Ind. A. 158. (b) 6 J. Ind. A. 93. (c) 5 J. Ind. A. 294. (d) 1 Comm 107. (e) 5 J. Ind. A. 167. (f) 5 J. Ind. A. 195. (g) Id. 119. (h) Mr. Phillip's Minute on the landed tenures of P. W. I. p. 8. (i) 5 Ind. Arch J. 409. (j) Mr. Phillip's Min. 10, 5 Ind. A. J. 102, 296.

W. Norris, I anxiously reconsidered my own decision, but found no reason for holding it wrong in principle; and as Sir B. Malkin's oninion, although entitled to the highest respect, was extra judicial while Sir W. Norris seemed to have been adopted from his predecersor, rather than to have been the result of any independent consideration of the subject, I thought myself at liberty to abide by own opinion. I must add that I felt less hesitation in doing so when I referred to the paragraph of the Indian Law Cimmissioners' report, cited by Sir W. Norris, for I gathered from it that they rather dissented from Sir B. Malkin's views, than concurred with them. if the latter was to be understood, as Sir W. Norris clearly understood him, as holding that the law of England was to be modified by the Court, in the extensive manner in which he thought it should be modified in the case of the adopted child. "We concur with the late Sir B. Malkin and the Governor General," the Commissioners say, "in thinking that it (the law of England) ought not to be changed substantially, but modified by express enactment, in the spirit in which Sir B. Malkin thought it should be administered, under a large and liberal regard to the different manners, usages and religious of the various nations of which the population is composed " (a); clearly intimating that though they approved of the suggested modifications. they considered that they should be made by the Legislature, and not by the Judges. I can see nothing in the Charter to admit of such a departure as that in question from the English rules of inheritance, and nothing in the widest principles of comity recognised by our law to admit of it. In truth, if the several passages referred to by Sir B. Malkin in his judgment, be examined, they will be found, I think, to effect nothing more than would have been implied, if the Charter had mere ordained, in general terms, that justice should be administered according to the law of England, without more. The law of England, wheresoever administered, respects, either ex comitate, or sex debito justitiæ, the religious and usages of strange sects and nations, to the extent to which the Charter requires that they shall be respected. Thus, if the Charter of 1807 had not expressly provided that witnesses should be sworn "in such manner as the Court should esteem most binding on their consciences," (b) or, in the words of the last Charter, " regard being always had to their religious belief," (c) the law of England would have permitted that our Mahometans, Hindoos, Chinese should be sworn according to the ceremonies of their respective religions (d); and assuredly the law of England would not have com-

⁽a) Special Rep. furnished in 1842 p. 135. (b) pp. 25, 32, 38. (c) pp 23, 26, 30. (d) Omichund v, Marker, Willes 538; 1 Smith's L. C. 195.

pelled those who were appointed to act as Constables, to do anything contrary to their religious, customs and manners, even if the Charter had omitted to provide that natives should be compelled to serve in that capacity only so far as their religious, customs and manners admitted. (a) So, if the Court does not entertain proceedings pro salute anima against Hindoos. Mahometans and Buddhists, it is not entirely owing to the limits imposed upon its Ecclesiastical juris. diction by the express terms of the Charter; for they would be equally free in England, from any such molestation by the Ecclesi-Again, a Mahometan who marries a second wife of his own religion and according to the rites of that religion, is not indictable for bigamy here; but it would be difficult to assert that if he were to contract such a marriage in England, he would be indictable at the Old Bailey. The offence was originally of ecclesiastical cognisance only, and would seem to contemplate only the marriages of those people among whom monogamy is an institution.

The only other passage which mentions native religions and customs is that which touches the framing and execution of process. This provision obviously relates merely to questions of procedure and practice; and besides, its effect is expressly limited, as I have already observed, by the provision that native religious and usages are to be respected only so far as the due execution of the law admits. I may add that I am not acquainted with any instances of this adaptation here; and the only cases of it in India that I have heard of are those mentioned by Sir C. Grey in a Minute dated October 2, 1829, (printed in App. V. to Rep. on affairs of East India Company p. 62) viz. the practice, at Madras, of making orders for the maintenance of native widows without suit, and, at Calcutta, of deciding many disputes among natives out of Court by award.

It does not seem to me, then, that the Charter has in any respect modified the law of England by any exceptional adaptation of it to the religions and usages of the East. With the exception of the perhaps superfluous instructions respecting the framing of process, it might have remained silent on the subject of religion and usage without affecting the administration of justice. In other matters of greater importance, respecting which the Charter makes no provision, native religions and usages are equally respected. Thus, if a Mahometan, or Hindoo, or Chinese marriage, celebrated here according to the religious ceremonies of the parties, be valid, it is not because the Charter makes it so—for, as I have already observed, it makes no exception in favour of native contracts of any kind—but because the law of England recognises it. The general rule of that law is

⁽a) 1 st ch. p. 41.

that the validity of a marriage is to be determined by the law of the place where it is celebrated. "The only principle," says Lord Stowell, "applicable to such a case by the law of England is, that the validity of the marriage rites must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of the place where the marriage was celebrated " (a). But where the law of the place is mapplicable to the parties, by reason of peculiarities of religious opinions and usages, then, from a sort of moral necessity, the validity of the marriage depends on whether it was performed according to the rites of their religion. Referring to the Jews, Lord Stowell says "there is in England a numerous and respectable body distinguished by great singularity of usages, who, though native subjects under the protection of the general law, are in many respects governed by institutions of their own, and particularly in their marriages; for, it being the practice of mankind to consecrate their marriages by religious ceremonies, the differences of religion, in all countries that admit residents professing religions essentially different, unavoidably introduce exceptions, in that matter, to the universality of the rule, which makes mere domicil the constituent of an unlimited subjection to the ordinary law of the country. What is the law of marriage, he adds, " in all foreign establishments settled in countries professing a religion essentially different? ... Nobody can suppose that, while the Mogul Empire existed, an Englishman was bound to consult the Koran for the celebration of his marriage. Even where no foreign connexion can be ascribed"—a case similar to that of the Eastern natives of this place-"a respect is shewn to the opinions and practice of a distinct people. The validity of a Greek marriage in the extensive dominions of Turkey, is left to depend, I presume, upon their own canons, without any reference to Mahomedan ceremonies. Their is a jus gentium upon this matter; a comity which treats with tenderness, or at least with toleration, the opinion and usages of a distinct people in this transaction of marriage" (b). How far the general law should circumscribe its own authority in the matter, it may, as the same Judge observes, be difficult to say a priori; and unquestionably it is not easy to extend to Mahometan marriages that principle of comity which the law of England has applied to Jewish marringes, without involving it in a recognition of polygamy, which has always been put by jurises beyond the pale of the comity of Christian

⁽a) Dalrymple and Dalrymple 2 Hagg. Consist. R. 59. Kent Comm. 81. 1 Burge, Col. and For. Law, 188. (b) Pertreis v. Tondear 1 Hagg. 136.

Nations (a). The question has never yet been decided by any Court in England; but Lord Brougham, while declaring in Warrender v. Warrender that an English Court would never recognise a plurality of wives, seems to have been of opinion that in dealing with a Turkish marriage "there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptation in the country where"-or, (in the case of a Mahometan marriage in an English possession,) in the religion in which—"the obligation was contracted" (b). In this place, where the law of England has been for the first time brought to bear upon races among whom polygamy has been established from the remotest antiquity, the Court has had to consider the question, and has always held polygamous marriages valid. Whether the Local Judicature erred, or not in coming to this decision, I do not stop to consider. It is enough to say that if it decided rightly, it is not because our Charter demands an exceptionally indulgent treatment of the question, but simply because the principle which makes the validity of a marriage to depend upon the religions of the parties, extends to polygamous marriages; while, if the Court has been wrong, it has erred, not in adopting a principle foreign to. and at variance with the law of England, but in stretching, beyond its legitimate limits, a perfecty well established one.

Again, if a Mahometan divorce be valid here—and its validity has never been disputed, I believe—it must be, not because there is anything in the Charter to make it valid, but because the law of England recognises the right of a Mahometan husband to dissolve the marriage contracted by him according to the Mahometan law with a Mahometan wife; upon the same principle that it recognises a Jewish divorce effected according to the custom of the Jews, without reference to the laws of the State where it was pronounced (c). in the case put by Sir B. Malkin, of a bequest by a Mahometan of property "to be distributed according to the law of God," I agree, and indeed I decided only a few months ago, that the distribution must be made according to the Koran; not, however, because the Charter requires that the English rules of construction shall be tempered by a liberal regard for the Mahometan faith, but simply because the strict rules of English law require that the intention of a testator shall be followed, and permit that that intention, in such a case as the supposed one, shall be ascertained in the same manner as Lady Hewley's gift to "godly preachers of Christ's holy Gospel." was ascertained to be intended for preachers of the religious party

⁽a) Story Conf. L. § § 113 a. 114. 2. (b) 1 Cl. & F. 531, 2. (c) Ganer v. Lady Lanesborough Peake 17.

to which she belonged (à 1.)—viz: by extrinsic evidence, shewing what was the religion of the testator, and leaving it to the Court to infer from the fact so arrived at, in what sense the words in question were used.

In the same way, if the adopted or natural child of a Chinese or a Hindoo is to be regarded as his heir, it must be, not by virtue of any provision in the Charter, but solely because the law of England recognizes him in that character. But if there be any subject on which the Courts of all countries, and especially the Courts of England and America, where the common law prevails, are agreed in disregarding foreign law, and therefore foreign religions and usages also, it is that of heirship, or succession to immovable property. Even as to contracts entered into, and instruments executed respecting immovable property within its jurisdiction, it suffers no other law to prevail. It denies, in limine, all comity to foreign laws in matters relating to realty, and declares that the law of the situs shall exclusively govern in regard to all rights, interests and titles in and to such property (a). So far, indeed, has this doctrine been carried, that in Doed. Birdwhistle v. Vardill (b), it was decided by the King's Bench, and afterwards by the House of Lords, in accordance with the quanimous opinion of the Judges, that a Scotchman born a bastard, but made, by the subsequent marriage of his parents, legitimate under the law of Scotland, and legitimate, therefore everywhere, even in England, for every other purpose, could not inherit real estate in England, because our law required that an heir should not only be legitimate, but should be bern after the marriage of his mother. "This is a rule," says Alexander C B., in delivering the opinion of the Judges on the first argument of that case, in 1835, " not of a personal nature, but of that class which, if I may use the expression, is sown in the land, springs out of it, and cannot, according to the law of England be abrogated or destroyed by any foreign rule or law whatsoever ... In selecting the heir for English inheritance, we must inquire only who is that heir by the local law." (c) If the law of England, then, refuses the right and character of heir to one who, though by the law of his own country legitimate is not born before the marriage of his mother, how can it give them to one who is not legitimate by any law, or not a son at all of the per--son whose inheritance he claims? It is obvious that to hold that the natural son of the Hindoo, and the adopted son of the Chinaman is heir to his natural and adoptive father here, would not be, as

⁽a1.) Attorney Genl. v. Wilson 9 Cl. and F. 355, and see The Attorney Genl. v. Pearson 3 Mer. 400. (a) Story Confl. L. § 463. (b) 5. B, & C. 438. 2 Cl; & F. 517 and 7 Cl. & F. 895, (c) 2. Cl. and F. 577.

in the case of Mahometan marriage, to give an extreme application to an established principle of law, but to adopt one at variance with the law.

Both the learned Judges who expressed themselves in favour of recognising an adopted son as heir, appear to have treated the question whether one person was the son of another, as depending upon the same class of considerations as the question whether one person was the wife of another. But the two relations are radically differ-The relation of husband and wife is one of contract, and the question whether it exists or not is a question of law. The relation between father and son is founded in unture. The question whether it exists between two persons is a question of fact. The relation between father and legitimate son, who is also his heir, is the same, with this addition, under English law, that the mother was legally married to the father before the child was born. relation involves a contract, it is true, but it is a contract with a third person, the mother, antecedent to the origin of the relation between father and heir. The question, then, whether that relation subsists is a complex one of fact and law. If the widow, or the two or three widows of a Mahometan, are held entitled in this country to a share of their husband's undisposed estate and effects, it is because the law flolds that their marriage, celebrated according to the rites of their religion, is valid, and created the relation of husband and wife. But a stranger decorated with the title of adopted son, or a natural son, whatever may be his rights under, Hindoo or Chinese law, cannot succeed to real estate, as heir of his adoptive or natural father in a country governed by English law, simply because not his offspring born after his marriage with the mother.

In this country, it is true, frechold property, as far as regardits transmission on death or intestacy of the owner, is taken to be of the nature of chattels real; but chattels real are for the purposes of the question under consideration, immovable property (a), and therefore all rights, interests and titles therein or thereto must be equally governed by the law of the land. It may possibly happen that hardship will sometimes be the consequence of thus inflexibly applying our laws to men alien to us, not only in race and religion, but in all their habits and domestic institutions. This, however, is a question for the Legislature and not for the Bench. Judges and Lawyers may legitimately give it full consideration in applying the known and established principles of law to new states of facts; but if those principles are to be departed from or "modified," it cannot be done by those whose whole and sole duty is to administer the law

⁽a) Story Conf. & & 447, 374.

as it stands. To leave it in the breast of the Judge to relax or supersede general restrictions and rules, whenever he thinks particular cases not within the reason of them would be, as Fearne says (a), a greater mischief in its consequences, than that which is intended to be obviated by it; for this is in fact making the discretion of the Judge the only law in such cases. I must add, however, that I am unable to see any hardship in adhering, in this country, to the rigid rule of the common law that all questions relating to land are governed solely by the law of the land. Owners of real estate are at liberty to devise it as they please; and they may therefore direct that it shall devolve (of course within the rule against perpetuity) in the course of succession established by the laws of their own nations or religions. To depart from the rule would, it seems to me, lead to great difficulty and confusion; and I cannot but think that those who would suffer Chinese, or any other law to have a voice in such questions, overlook the inconvenience to which Mr. Justice Story points," of any nation suffering property locally and permaneutly situate within its own territory, to be subject to be transferred by any other laws than its own; and thus jutroducing into the bosom of its own jurisprudence all the innumerable diversities of foreign laws to regulate its own titles to such property; many of which laws can be but imperfectly ascertained and many of which may become matters of subtle controversy" (b).

Looking back, then, to the early history of the Settlement on the one hand, and the language of the Charters on the other, I think that Sir B. Malkin had good grounds, independently of the uniform course of authority on which he relied, for stating that the King's Charter had introduced English law into the Settlement. It was, no doubt, a startling consequence of this doctrine, that the laws of an old and civilised community were abolished by implication, while those of England were substituted in its stead; but I think that the

⁽a) Cont. Rem. 535 n. (b) Story Confl. L. § 440, "Very little information," says Mr. Medhurst in a learned article on Marriage, Affinity and Inheritance in China, "has been hitherto collected as to the local usages in different parts of the country, with regard to the rights of succession to property in China;" (Transactions of the China Branch of the Royal Asiatic Society, part IV. page 30). But if the information which he has collected be correct, Sir W. Norris was misled, in the case cited, as to the Chinese law of inheritance; for the power of adoption appears to be strictly limited to the male relations of the next generation in a regular order of succession. Nothing is said of adopting daughters. Even legitimate daughters are not entitled to any share of their father's real or personal estate, except on failure of the male relatives who are the objects of adoption.

Recorder would have found it difficult to administer "justice and right" according to the Roman Dutch law, under a Charter which, in the numerous particulars already adverted to, implied that the common law was the only law in force.

The Charter of 1807 having introduced the law of England into this Island, that law, as it existed at that date, would have been the law of this country, if another Charter had not been subsequently This second Charter was granted in 1826, when Singapore and Malacca were first united to Prince of Wales' Island. question then arises, did it import the later law into this Station? The case of Rodyk v. Williamson (a) was a Malacca case, and when Sir B. Malkin decided in it that the law of England had been introduced there by the Charter so as to supersede the law of Holland, he must have held that the law introduced was the law of England as it stood in 1826, since the Charter of that date was the only Charter extending to Malacca. If so, the same law must, upon the same grounds, have been introduced into Singapore by the same Can it then have had a different effect in Penang? If it had not extended beyond this place," the justice and right " according to which it directs the Court to decide, might well have been understood to mean, as was suggested by Sir B. Malkin, "the just and rightful administration of the Law which actually existed " (b). that is, the law of the land as it had been already established and in force for the preceding eighteen or twenty years. But to adopt such a construction here after the decision in Rodyk v. Williamson. would be open to great objection. To treat the Charter, quoad one station, as merely reorganising a Court, while quoad the other two it was treated as introducing new law, would be to give to the same instrument different meanings in different localities; a construction which would have neither convenience nor good sense to recommend I am therefore of opinion that whatever law the second Charter introduced into Malacca, was introduced into every part of the Settlement; and as it has been decided that the law of England, as it stood in 1826 was brought by it into Malacca, I am of opinion that the same law became, by the same means, the law of Penang.

Whether a similar construction should be put upon the Charter of 1855, it is not now necessary to consider because the Act upon which the present motion was founded, was passed before the date of the second Charter. But if that question should ever arise, it will perhaps be material to consider whether the circumstances of the Settlement, or the language of the Charter, require such a construction,

⁽a) Cited in the judgment in the goods of Abdullah; Morton R. 19. (b) Letter to G. G. ubi. sup. p. 87

or rather do not require that it should be treated, like all the Indian Charters granted subsequently to 1726, merely as an instrument reconstructing the Court. As the new Charter, confirmed in all respects by Parliament, (18 & 19 Vic. c. 93 § 4 .) gives the Judges of the Court "such jurisdiction and authority" as the Common Luw and Equity Judges " have or lawfully exercise" in England, there would seem to be some ground for holding that any powers conferred on the latter by Statutes passed at any time before the date of the Charter, would vest in the former also. So, when it directs the Court to "hear", "give judgment and award execution" on "indictments and offences", "and in all respects to administer criminal justice in such or the like manner and form, as nearly as circumstances admit, as the Courts of Over and Terminer and Jail Delivery" in England, it might be contended that the English Criminal Law. as it stood in 1855, was thereby made the law here. On the other hand, it may be material to observe that the new Charter does not. like the preceding one, abolish the old Court, and introduce the law of England for the first time into new possessions, but only reorganises the existing tribunal by dividing it into two divisions and adding a second Recorder. It may also be important to bear in mind that since the date of the second Charter, a legislative body has been established in India, which legislates for the Straits, and that difficulties might arise in attempting to give effect at the same time to recent Acts of Parliament and Acts of the Legislative Council bearing on the same branch of law.

How much of the English Statute law which was in existence in 1826, is in force here, is, in some measure, as I have already said, a question of construction. The effect of the Charter of that year is it seems to me, to make the English criminal law in force" as far as the condition and the circumstances of the place and the persons admit"; the civil law, "as far as circumstances admit"; and that branch which is administered in England by the Spiritual Courts, "as far as the religions, manners and customs of the inhabitants admit" In other words, it makes just so much of the law of England our lex loci as, according to Blackstone, is imported into a Colony newly founded by English settlers, viz: "as much as is applicable to the situation and condition" of the Settlement (a). If a law of the mother country, either from the end at which it is aimed, or from the means by which that end is sought to be attained, is local in its character (b), or, even if it be not local, but injustice or inconvenience would arise if it were enforced in the Colony (c), it is not part of the law of the Colony. It was upon the former of these

(c) 1Moo P. C. 277.

⁽a) 1 Comm. 107. (b) 2 Mer. 162, 3.

grounds that Sir W. Grant held that the Statute of Mortmain (9 Geo. 2) was not in force in the island of Grenada. "What the Legis. lature had to consider," he says, " was whether, as there was so much of the land of England already in mortmain, it was not exnedient to lesson the facility of putting more of it into that situation. That was a consideration purely local. It related to land in England. and to land in England only" (a). And in another part of his judgment, he points out that the provision requiring that deeds of conveyance to charitable uses should be enrolled in the Court of Chancery within six months of their execution, shewed that the Act could not apply to a country which did not possess an enrolment office, since its requisition could not be complied with there; otherwise what was a qualified prohibition in England, would be an absolute prohibition in Grenada (b). So, it was partly on the ground of the inconvenience and injustice which would ensue from the enforcement of the English law which incapacitates aliens from holding land, that the Privy Council held that that portion of our law was not in force in India (c); and to all or some of the reasons above mentioned may be referred the different classes of laws mentioned by Blackstone as inapplicable to Colonies: viz: "police and revenue laws, the mode of maintenance of the established Clergy, the jurisdiction of the Spiritual Courts, and a multitude of other provisions." (d).

Now, whether the Acts which provide for the punishment of labourers for wilful breaches of their contracts with their employers come within any of the grounds which make Statutes of the mother country inapplicable to this Colony, is a question upon which I felt some doubt, owing chiefly to a passage in the judgment of the Master of the Rolls in the case just referred to, the Attorney General v. Stewart. Sir W. Grant there says: "Whether the Statute of Mortmain be in force in the island of Grenada, will, as it seems to me, depend on this consideration-whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed" (e). If this were strictly correct, no English law would be a part of the law of any Colony, unless it were equally applicable to every country governed by English law. What colonists would carry with them to their settlements would be only such laws as were based on general principles of the widest application, and would not perhaps include

⁽a) Attorney Genl. v. Stewart. 2 Mer, 143. 162. (b) Id. 163. (c) The Mayor of Lyons v. The East. India Company; 1 Moo P. C. 175. (d) Comm. 107. (e) 2 Mer. 160.

among them some very suitable to their condition and very necessary to their wants. The provincial Courts to whom it appertains to decide in the first instance whether the English Statute is in force in the Colony, would have to consider not merely whether, in the language of Blackstone, the law in question was "applicable to the situation and condition " of its own settlement, or was " neither necessary nor convenient" to it; but whether it was, in its nature of univer-al application in all English Colonies; a question which such a Court might often be very incompetent to decide, and have inadequate means of deciding. Having regard, however, to the manner in which the proposition is stated by Sir W. Grant, I do not think that he intended to lay down the law differently from Blackstone. He intended merely to decide that the Mortmain Act did not apply to Grenada, and he shewed that it did not, by shewing that it was from its object and machinery applicable exclusively to England. But after all, the question here must turn rather on the words of the Charter, than on the language of Sir W. Grant; and I think that all that I have to inquire is whether the Act in question is applicable to the situation and condition of this Settlement, that is, whether or not it is exclusively local in its object and in its machinery and whether or not injustice or inconvenience would arise from enforceing it.

The Act certainly is not exclusively local in its object, which is to give an effectual remedy for wilful breaches of contract by a class of persons against whom the ordinary remedy of an action for damages is altogether illusory. The mischief is not peculiar to England. It is, in truth, probably less great there than in most of its possessions, and the remedy is not peculiar to England. The Bengal Regulations, for instance, provide a similar one in similar cases (a). I observe, also, that one of the earlier English Statutes on this subject, the 20 Geo. 2 c. 19, is included in a declaratory Act passed by the General Assembly of the Bahamas, for the purpose of preserving to the Colonists those " many good and wholesome laws" of which, says the preamble, they had " sometimes been in danger of being deprived" in consequence of doubts entertained as to their being in all respects applicable to the circumstances and condition of the Colony (b). And it is there placed in the same catalogue with such Acts as the Statutes of Merton, Westminster I & II, and Gloucester, with the 13th & 27th Eliz., (avoiding voluntary conveyances as against creditors and purchasers), with the Statute of Frauds, the Habeas Corpus Act (31 Car. II.), and other enactments of a similarly general nature.

In the next place, so far from any injustice or inconvenience

⁽a) Reg. 1819, 7, § 75.

being likely to arise from enforcing this Act of the 4 Geo. 4, it seems to me that both injustice and inconvenience would be the inevitable result, if some law of the same kind were not in force here. From the affidavit sworn in this matter by some twenty gentlemen, comprising all the leading employers of labourers in the place,-European, Hindoo, and Chinese, -it appears that for all the ordinary heavy work of cultivation, as well as most kinds of skilled labour, the country is almost wholly dependent upon the natives of India, China and Java: that these men arrive indebted for their passage. and receive, on being hired, advances on their wages, varying from \$ 18 to 25 for Chinese, from \$10 to \$12 for Klings, and from \$35 to \$50 for Javanese, (who are generally pilgrims on their way home); that from 4000 to 5000 Chinese, from 3000 to 4000 Klings. and from 1500 to 2000 Javanese arrive annually, but that few remain long in the country—the Chinese dispersing into the adjoining Malay and Siamese territories, the Klings returning home in three or four years, and the Javanese as soon as their engagements are completed; and that there is a constant demand for new labourers. It appears also, that from the facility with which even the poorest can obtain forest land for cultivation on their own account, labourers soon become disinclined to work for wages, and the desire of avoiding the repayment of the advances made to them on their arrival, is another motive for inducing them to absent themselves, or otherwise wilfully misconduct themselves in their employment.

From this statement I conclude that the Act is not only quite as applicable to the condition of this Settlement as it is to England, but that it is much more necessary to it; for not only is it more difficult to replace here a defaulting labourer by another, by reason of the scarcity of men, but also more improbable that damages should be recovered from the defaulters, since they are, as a class, generally in the last degree of destitution. Besides, in many cases when a labourer in this place absconds, he not merely breaks his contract, but defrauds his employer of the advances made to him, since he refuses to repay them in the only manner in which he can pay them, by his labour. Indeed, so important, so essential I might say, do some such stringent provisions as those of the Act in question appear to the welfare of this Settlement, that I fear I should deprive the community of one of those " many good and wholesome laws" to which it is entitled, if I were now to hesitate to hold that this Act was part of the law of the place. Lastly, the machinery by which the mischief is remedied, is not peculiar to England. It is in full force and operation here, for we have, under the Charter, both Justices of the Peace and a House of Correction.

Seeing, then, that neither the mischief, nor the means by which it is redressed, are peculiar to England, but exist here equally, and that no injustice or inconvenience can arise from enforcing the Act. I am of opinion that the 4 Geo. 4, c. 34 is law in this Settlement.

I now come to the question whether the Magistrate was right in declining to adjudicate upon the case, on the ground alleged, viz. "that the jurisdiction given by him had been exhausted by the previous conviction." In support of this view of the Act he has undoubtedly the high authority of the Chief Baron, in Exparte Baker (a). In that case, the affidavits tendered to show that the Magistrate had no jurisdiction, stated that the prisoner had been previously convicted and imprisoned; that on his discharge he had not returned to his service, and that he had thereupon been again committed, "I have come to the conclusion," says Pollock C. B., "I must say satisfactorily to my own mind, that the Legislature, by the third Section of the 4 Geo. 4. c. 34, did not intend that a workman should be put into prison more than once for not fullfilling his contract....I cannot help saying it appears to me contrary to the general spirit of the English law, and the administration of it, that a man should be punished thus over and over again, for what substantially is the same matter, and which for civil purposes, would be considered and adjudicated to be the same matter, and which would admit of but one action being brought in a common law Court in Westminster, Hall (b)." This opinion is to some extent shared by Mr. Baron Martin, who in the same case stated it to be his impression that the nature of the offence must be looked to, that " if the offence be a man's absenting himself on a claim of right, and accompanied by a declaration that he would absent himself for good, that all that is but one offence, and ought to be dealt with as one;" while, if it was a mere absconding for a day or a few days, the case was of a different character and should be regulated by a different set of rules (c). On the other hand, both Bramwell and Watson B. B. expressed themselves very decidedly of opinion that the Magistrate might convict a second time for a second absenting. " I do not think," Bramwell B. observes, "that the first absenting, and punishment, consequent thereon, was a dissolution of the contract. It may give to the master a right to discharge the workman. If he does not avail himself of that power of di-charge, the service continues, and there may be a second absenting himself from the same service" (d). Watson B. says: " when the imprisonment is over, he is still a servant; the contract continues, and his absence, again, is an

⁽a) 26 L. J. M. C. 155. (b) p. 168. (c) p. 166. (d) p. 162.

absence within the Act of Parliament" (a1). As, in this, diversity of views, I am left to act upon my own, I adopt those of the last named learned Judges. Even the Chief Baron does not absolutely deny that the second absenting is a distinct offence, for he qualifies his assertion by stating that the two Acts are " substantially", that is, I take it, "not percisely", one. It is perhaps true that, in practice, the repeated acts of misconduct would be treated as one offence, and that one action only would be brought in respect of them; but it would be difficult to maintain the proposition, that, in strict law, a second absenting is not a sufficient cause for a second action. If a labourer could not be punished for a second absenting, he would have a power which the law certainly denies to wrong doers in all other cases, viz; that of taking advantage of his own wrong; for he would be at liberty to rescind at his own pleasure his contract with his master, without the consent of the latter. But I do not think he has any such power. As far as he is concerned, the contract continues binding, and it is his duty to return to the performance of it at the expiration of his sentence. If he wants it rescinded, he must endeavour to persuade the Magistrate to exercise in his favour the power which the Act gives him of discharging the servant from his contract—a power probably given for the protection of the labourer, but which would have been wholly superflous if the latter had actually rid himself of his obligation by once breaking it. The master, indeed, is at liberty to avoid the contract, and it was contended in Exparts Baker, as in the present case, that on this account the man was not bound to return unless requested to do so; but I think that the objection was satisfactorily met by the answer of counsel, in the case in the Exchequer, that if the contract continued in force as against the servant, a request to continue to perform it was unnecessary (a). It is clear that if the contract were not voidable by either party, the master would not be bound to give the servant notice to resume the performance of his part of it; and it seems to me that the privilege of rescission acquired by the master through the servant's misconduct gives no fresh right to the latter. The servant, by his default, can give his master the option of rescinding the contract, but cannot impose upon him the burden of a condition, not contained in the contract. The only notice which the master is, under such circumstances, bound to give, is, not a notice of his adherence to the contract, but a notice of his intention to rescind it. Until such notice is given, the servant is bound to treat the agreement as subsisting, and to continue to perform his part of it (b).

For these reasons I think that the Magistrate ought to have heard (a1), p. 160, (a) Id. p. 158. (b) I was not awere, when I delivered this

and adjudicated upon this case; and the rule must consequently be made absolute.

judgment, that a habeas corpus had been moved for in Baker's Case in the Queen's Bench, before the application to the Court of Exchequer. From the report of the case in the Q. B., it appears that all the Judges (Lord Campbell C. J., Coleridge and Erle J. J.) agreed in holding that the man's not returning to his service at the end of his imprisonment, was a second absenting himself from his service, and that he might be again convicted and imprisoned. See 26 Law Journal Mag. Cases 193.

Penang Gazatte. 8th August 1857., (See Regina v. Willans, page 67, note b.)

A case involving principles of great importance has lately been decided at Singapore, the judgment of the learned Recorder (Sir R Mc. Causland) will be found published in our column. (See In re Chong Long's Estate, a Singapore case, dated the 14th July 1857) The arguments of Counsel are not given and the report of the judg. ment is so brief and general that we are, in some measure, left to conjecture the reasoning by which it, or a portion of it, was arrived So much of the law of England as partakes of a religious character is obviously inapplicable to a polytheistic Oriental society It can easily be understood therefore that a claim to bind the Chinese of the Straits by the Statutes against superstitious uses should be at once rejected as intolerant and absurd. But the law restraining the accumulation of income has no necessary connection with religion It is based on a policy which, whether sound or unsound, is of universal application. It is no mandate of the Chinese religion, any more than it is of the Christian, that property should be accumulated in perpetuity. How far the law of the Settlement takes its form from the fact of the mass of the population being pagan, is a standing problem of a highly complex nature, solution of which is only to be approached by degrees. It is very desirable that every, new question arising out of the partial non-adaptation of the law of England to the Straits should be thoroughly discussed in the Court and the arguments and judgment fully reported. As Chong Long's will has been before the Court for at least a dozen years, and the whole strength of the Singapore bar appears to have been arrayed on the final field day, the arguments on all sides were doubtless exhaustive. and it is to be hoped that a full report of them and of the grounds of the Recorder's opinion will be published.

There is not, so far as we know, any reported case in which the general question as to the law of the Settlement has been fairly grappled with. The first Recorders of Penang appear to have been deterred by its difficulty and complexity from dealing with it with a

firm hand. The law of England was administered when the parties on both sides were Englishmen. But instead of seeking for legal principles that would afford the necessary toleration to Asiatic religious and customs while preserving the uniformity of the law. they appear to have evaded the task by converting the Court into a sort of Chamber of Arbitration, when the parties were Asiatics desirous of adhering to their native laws or usages in the setttlement of their disputes. It is not very surprising that this course should have been followed. The Judges found a state of things prevailing of which there was no previous example. The Charter of the Court was silent as to the law. They knew no law but that of England. There was no established local law. The community was exceedingly mixed, the inhabitants, with an exception numerically insignificant, being Chinese, Malays, Indians, Arabs and other Asiatics. The actual law that had been administered since this heterogeneous population had begun to gather, was partly natural equity to all, and partly the law of each race to those who belonged to it. Continuing the Oriental system prevailing in the dominion of Kedah of which Penang had formed a part, each considerable class of Asiatics was constituted a community by itself under a native head or "Captain," who, in civil matters, adjudicated for it according to the religion and laws of the race. The small English ingredient were so far from considering that their native law had become the law of the place, that they were themselves left, in a great degree, to natural equity. Even when a professional Judge and Magistrate was appointed he could find nothing better to guide him. The actual laws were thus not local but personal or ethnic. The operation of a judicial Charter from the Crown on such a state of things was a new question. tically the law of England appears to have been brought into force as the lex loci, but subject to large and indefinite or ill understood exceptions, arising from the mixed and Asiatic character of the ponulation. The first Judge who completely carried out the Indian doctrine that the Charters of the Courts introduced the law of England and abrogated all prior local law was Sir Benjamin Malkin. He was far from admitting the reasonableness or justice of such a construction, but he considered himself bound by the decisions of the Presidency Courts. His judgment has never been disturbed in the Straits, although the question remains for final adjudication in England. According to this dectrine, the law of Penang is the law of England at the proclamation of the first Charter in 1807. The Colony was not specially annexed to England so as to be on the footing of an English country, but remained a substantive division of the British Empire. -- a separate dominion of the Crown.

existing law of one of the older provinces of the Empire was introduced and become the law of Penang. But thenceforth the two bodies of law were independent. Each had its separate history, and. no change in the law of England affected the law of Penang, any more than a change in the latter affected the former. Another consequence of the law being simply imported without any territorial nunexation, was, that only so much of the law of England took effect as the circumstances of the Colony required and admitted. considerable portion of the law of England is specially adapted to the customs and religion of the English people and to English institutions not found in the transmarine portions of the Empire. The Imperial Government did not confer on Penang all the institutions of England or convert the mixed population into Englishmen. left the colonial community to adopt the law of England so far as it was suited to their needs. It did not attempt by legislative authority to accomplish the impossible task of adapting them to the law of England.

The case of the introduction of the law of England into a Colony already occupied by a composite and civilised community of Orientals has not been contemplated by English Lawyers and Judges. No principles specially bearing on it are to be found in the commentaries of the former or the decisions of the latter. The reason is obvious. The construction that has been given to the Indian Charters is purely factitious. The laws of any portion of the Empire can only be altered by Legislative, or, in certain Colonies, by Royal enactment, and every Act or Order contains special provisions to meet the justice of the case. The Penang Charter does not touch the law. It assumes the existence of a local law adapted to the mixed community. It establishes a Court on the English model, not to import a new law, but to administer that already in operation. It refers to the various religions, customs and habits of the population as facts existing and therefore legalised, and it merely provides that the Court shall adapt its jurisdiction and procedure to these facts. It gives it potentially all the powers of all the English Courts, but prohibits it from exercising any of them that may clash with these facts and from exercising those adapted to the population in modes that would so clash. When so much violence is done to language as, to hold that a Charter establishing a Court abolishes the law of the land and enacts a foreign one in its place, it is a comparatively small sin against the rules of construction to hold that the provisions for the accommodation of the introduced judicial functions and procedure to the established religions and customs of the people, are applicable to the introduced law also. There has been some vaccilation on this

subject, and even Sir Benjamin Malkin, the most scientific and logical of all our past Recorders and the first who attempted to give completeness and consistency to the Indian interpretation of the Charter, can hardly be said to have succeeded.

Leaving the accommodative provisions of the Charter out of view, and admitting that it introduced the law of England without any express qualification, the answer to the question how much of it came into operation in a case not specially met by English decisions, must be sought in the principles that have been applied to cases more or less analogous. That of the occupation of a new territory by British subjects is the most favourable, is one respect, for the unimpeded transfer of the law, because there are no prior and conflicting usages and religions to be considered. On the other hand, it is less adapted for the incidence of some portions of the law than a developed commercial society, however composite. The recognized principles applicable to such a case are thus stated by Blackstone.

"Plantations or Colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of Colonies, with respect to the law by which they are bound. For it hath been held. that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions-Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant Colony; such, for instance, as the general rules of inheritance, and fof protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of Police and Revenue, (such especially as are enforced by penalties) the Bankrupt laws, the Mortmain Acts, the Poor and Game laws, the mode of maintenance for the Established Clergy, the jurisdiction of Spiritual Courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the King in Council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the Legislalature

in the mother country."

In one of the very few English cases in which the Indian construction of the Charters has been glanced at, Master Stephen, in reporting, said, that the course actually taken in India had been to treat the case, in a great measure, like that of a newly discovered country. The question whether the English law of real property had been introduced into Calcutta was dealt with very much as one of fact to be settled by the practice of conveyancers and the judgments of the Court. In a later case the question whether the English law disabling aliens from holding land was in force in Calcutta, was made to rest partly on the fact of its actual observance or the reverse and partly on that of its suitableness or the reverse to the circumstances of India.

In applying these principles to the condition of things existing in Penang when the law of England was inferentially introduced by the Charter, that law divides itself into three portions. A portion was totally inapplicable to the Colony. A portion was applicable with due accommodation to the religious and customs of the Asiatics. The remainder, being unmixed with local, national or religious con-

siderations, was entirely applicable.

Christianity is said to be part of the law of England, and the national laws are theoretically, and many of them really, based upon it. Those laws that enforce the peculiar observances or tenets of Christianity and repress those of other creeds would be suitable to Colony settled by Englishmen only. But they are wholly inapplicable to a Colony like that described in the Charter of 1807, which could never have been formed and could not have been maintained, if the sectarian portion of the English law had been put in force here. such a Colony the first of all laws, that of self-preservation, decides, that there can be no local or legal creed, -no distinction in the eye of the law between catholic and heretic, protestant and papist, christian and pagan, religion and super-tition. Universal toleration, in accordance with universal morality, is here the root and life-sap of society, and this very universality provides the only necessary limitation, since a teleration that is common must be mutual. No sect has a right to impede another in its religious observances, or to claim more than freedom to perform its own. There can be no tabooing of particular fragments of time in a Colony where even the three sabbatical classes differ as to the holy day of the week, and in which nearly every day in the year is sacred to some section of the community. There can be no tabooing of public places against religious celebrations of any kind unless they are a nuisance and offence to the community. None of the English laws that are based on animosity to

certain forms of Christianity, to Judaism or to paganism, can have any force in such a Colony. Laws that prevent the free disposal of property in accordance with the requirements of any of the established creeds, must also be excluded. But freedom of disposal is all that can be claimed. In a polytheistic society the State or the law cannot become the executor of each creed. In cases where men do not choose to make the necessary provisions for complying with the requirements of their religion, the sin must rest on their own heads. For example, if a Chinaman die without making a will to secure the application of a part of his estate for the performance of the rites to his manes, the State is not bound to step in and succour the improvident and unhappy ghost. If it did, it would soon find itself-trus-

tee for thousands of wandering spirits.

Another portion of the law is applicable, with due accommodation to the established religious and customs. We use the ordinary phraseology, but it is not very exact. The principles of the law are not modified. It is only their application or incidence that varies. For example, by the law of England the different domestic relations are accompanied by various duties. In England these relations are, to a great extent, formed or regulated in conformity with the Christian religion. But the correlative duties are, for the most part of universal obligation either in ethics or policy. In a polytheistic Colony the formation and extinction of these relations must be left to the operation of the religion and customs of each race. But the duties incidental to them, as they fall to be enforced by the State. must be regulated by the law. Who are the wives and children of Hindu or a Chinese is a question of fact, to be decided with reference to the compact imposed by the religion and customs of the race. A Chinese who adopts a child, or directs his executors to do so for him, intends to give it all the rights of a child by blood. What these rights are must be declared by the law, in the absence of paternal provision. The law merely makes a general will for those who neglect to do so for themselves, and who may therefore be held to have accepted that provided for intestacy by the State. The mutual rights of husband and wife vary greatly amongst different races. When Mahomedans marry there is an implied contract that the wife shall retain her own property, personal as well as real. The law of England does not prohibit such a contract. but it requires it to be in writing.

Nearly the whole body of mercantile law, and the law of contracts generally, furnish examples of that portion of the law of England which is of universal application, and which must be taken to have at once come into operation in Penang in 1807.

According to this view the actual composition and condition of the population in 1807 determined the extent to which the law of England was then introduced. But so much of it as took effect, became the lex loci, to which all were alike subject. The incidence of the law did not vary with the class or cross. There was no further accommodation or modification of its principles. To hold that there was, would be to deprive the law of its territorial English character and to give it an ethnic Asiatic one.

English settlers who take possession of an unoccupied Island carry with them so much of the law as is adapted for their new society. The mixed Penang community of 1807 received so much of the law of England, as was adapted to their developed society. The English and Scotch * residents had no peculiar claim to have their religion or customs regarded in deciding the question of adaptation. The rights and interests of the society as a community furnished the rule for all. The judicature of the mixed society had to consider all its members as on an equal footing, and to determine for them what should be admitted and what rejected. The actual state of the society having once drawn the line between the applicable and the inapplicable, the former was thenceforth subject to no modification, the latter was thenceforth a foreign law.

In practice we suspect this principle has not been steadily contemplated. It has been sought to find the reason and the limits of a restricted application of the law in those passages in the Charter which refer to the jurisdiction and the procedure only. A glance at Sir Benjamin Malkin's opinions will show that even he passed from a somewhat narrow to a liberal view of the law. His ultimate statement of his opinion appears to be in accordance with the view we have endeavoured to explain. Sir Benjamin Malkin in a case decided by him at Malacca in 1834 felt himself "bound by the uniform course of authority to hold, that the introduction of the King's Charter into these Settlements had introduced the existing law of England also, except in some cases where it was modified by express provision, and had abrogated any law previously existing." In a subsequet case, he said, "in the general expression the Charter seems to have intended to give a certain degree of protection and indulgence to the various nations resorting here, not very clearly defined,

^{*} Scotch colonists would be held to carry with them not Blackstone but Erskine. The body of the English law is provincial like the Scotch, not imperial, although, like the latter, it is has now a small imperial ingredient. What law is impliedly established by a mixed body of English and Scotch? English law is not the birthright of the latter.

yet perhaps easily enough applied in particular cases, but not generally to sanction or recognize their law." In a letter to the Supreme Government with reference to Lord Auckland's minute on the administration of justice in the Straits, Sir B. Malkin, after remarking that he did not understand the Governor General's views of the construction of the Charter at all to differ from his own, proceeds to say-" With respect to the law whereby rights are constituted and established, I understand the Governor General to consider that it at present is, and ought, in general, for the present to continue, the law of England, modified * indeed by considerations how far some of its particular provisions and enactments are suitable to the circumstances of the Colony, and administered in all cases with a large and liberal regard to the manners, usages and religious of the different nations subject to its operation, but containing no provisions or principles which cannot be based on that law so modified and construed. None of the provisions giving the Hindoos and Mahomedans subject to the jurisdiction of the Supreme Court here [Calcutta], and at Madras and Bombay, the benefit of their own laws in certain cases, extend to the Straits, where it is clear that only one law is established for all inhabitants. to whatever extent the application of that law may be different, from considerations of the different institutions of the various classes of residents there." The Indian Law Commissioners, in their Report on the Judicial Establishment of the Straits, adopt these views. In para 4 they say " It has been judicially decided that the law of England is the lex loci, to which the inhabitants of all classes are subject; that is to say, so much of it as applicable to their various + circumstances." In para, 5 they " concur with the late Sir Benjamin Malkin and the Governor General in thinking that it ought not to be changed substantially, but modified by express enactments, in the spirit in which Sir Benjamin Malkin thought it should be administered, under a large and liberal regard to the different manners, usages and religions of the various nations of which the population is composed." Sir William Norris in deciding at Malacca in 1843 that the adopted son and daughter of a Chinese, were entitled to his estate in preference to the nearest relative by blood, a nephew, remarked, that in practice he had adhered to the principle referred to in this paragraph. .

^{*} Query as to this word. The Court assumes a legislative power when it does not simply reject a law as inapplicable to the Colony, but modifies it so as to make it applicable.

[†] Not " respective. "

PENANG GAZETTE, 24th OCTOBER 1857.

(See Reg. v. Willans, paye 67. note b.)

Sometime since we placed a few general remarks on the Law of the Settlement before our readers, and they will no doubt be glad to see it treated from another point of view by another hand. The rough notes were given to us by the writer long ago, and he has not had an opportunity of revising them.

One of the most important questions which arises on a perusal of the Charter of Justice is the operation of that document on the law to be administered under its sanction. It has been broadly stated that the Charter introduces the Common Law of England as it stood at the date of the Charter and all Public General Statutes passed for England and not inapplicable to the wants and condition of the inhabitants of these Settlements. This view of the case appears open to much objection and is certainly not in analogy with the Law as construed in the Colonies, under circumstances, in this respect, similar. It has been decided in the Supreme Courts in India that no Act of Parliament passed since the 13th year of Geo. 1. (1726) extends to India unless specially so provided. The date thus fixed relates to the passing of the Charter authorizing the establishment of Mayor's Courts with common law jurisdiction in the three Presidency Towns in the year 1726. Since that date several Charters have been passed altering, amending and enlarging the jurisdiction of these Courts, but it has not been held. in any single case, that the introduction of these new Charters has brought with them a fresh access of Acts of Parliament, or has affected the Common Law as it stood in 1726.

In the discussions on the lex loci for India in 1845 the Law Commissioners set out the law as above recited in the 4th sect. of the Draft Act submitted by them, and in an explanatory note, added that they had consulted the Judges of the Supreme Courts and had been by them informed that the allegation was substantially correct (see Reports published in 1847, Parl paper p. 631-3.) At a subsequent date Sir E. Perry objected to the truth of the proposition in so far as it related to Bombay. It was not correct to say that the Charter of 1726 was the first Charter of Justice, as Sir Erskine had himself ruled that the Charter of 1669 by Charles 2. must have introduced English Law into Bombay if it had not indeed been already introduced at or immediately after the transfer of that Island by the Crown of Portugal to England in 1661. p. 656.

The question has been decided on authority as far as the Supreme

Courts in India are concerned, but in the Straits it is still open to discussion, and grave doubts may be entertained as to the operation of the Charters in this respect at the three Stations, whether at Penang the passing of the second Charter of 1827 altered the Statute law, and as to Singapore and Malacea whether the passing of the 3rd Charter of 1855 altered the Statutes; again whether the 1st Charter affected the law even at Penang.

The point has never been judicially settled in the Straits and consequently arguments must be based on analogy, taking the case of the Royal Courts in India as the guide. But first it will be necessary to state briefly some points of law on which to base the argument

Serjeant Stephen says "Colonies (using the term generally) are either gained from other States by conquest or treaty, or are acquired by right of occupancy only, that is by finding them desert and uncultivated and peopling them from the mother country. But there is a difference between those two species of Colonies with respect to the laws by which they are bound.

In conquered or ceded countries that have already laws of their own, these laws remain in force till changed by competent authority, and the Common Law of England as such has no allowance or authority there : while on the other hand it hath been held (Blankard v. Galdy, Salkeld 411-and the same case in 4 Modern Reports 215-also Smith v. Brown, Salkeld 666,) that if an uninhabited country be discovered and planted by English subjects all the English law then in being, which are the birthright of every subject (see 2 Peere, Willfams 75) are immediately then in force. But this must be understood with very many and great restrictions. Such colonists carry with them so much of the English law as is applicable to their own situation and the condition of an infant Colony. such for instance as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of Police and Revenue, (such especially as are enforced by penalties.) the mode of maintenance for the Established Clergy, the iurisdiction of Spiritual Courts, and a multitude of other provisions are necessary nor convenient for them and are therefore not in force" p. 99.

The Severeign exercises as to Colonies of every description the right of appointing Governors, of issuing warrants for the appointment of all Officers judicial or administrative. The right of legislation too is in many cases vested in the Crown, for all such Colonies as have been acquired by conquest or cession are subject to

such laws as the Sovereign in Council may himself impose (Calvin's case, 7 Reports 17 b., and Campbell v. Hall, Cowper 211) or to such as may be imposed by any Legislative Council established there by the Royal authority. This does not however extend to Colonies acquired by occupancy, for in these the Crown possesses no such legislative right. 1 Bl. Com. 99. Though it is competent for Parliament to legislate for the Colonies, yet a Colony is not considered as affected by Acts passed after its acquisition and while it is subject to other legislative authority (whether that of the Sovereign in Council or of a local Council in assembly) unless it be menti-ned in the Act by name or by a general description, or unless the Act be in its nature obviously intended to affect all our Possessions. But in a Colony acquired by occupancy, Acts passed before its acquisition come into force immediately upon that event, as part of the generallaw of England (as to all provisions at least not unsuitable to its social circumstances); though it is otherwise in the case of a Colony won by conquest or cession which remains subject to its own preexisting laws, and is not in general affected by Statutes of the United Kingdom passed before its acquisition. p. 102.

Before applying the above principles of law it will be proper

to consider the situation of the Settlement.

What is the status of each of these Settlements Penang, Singa-

pore and Malacca?

On the 12th of August 1786, Captain Light took possession of Penang, then almost uninhabited, in virtue of an agreement with the King of Keddah, the ruler of the territories off which the Island is situated. That the Island was then inhabited appears proved by the fact mentioned by Captain Light in his Journal (See Journal of the Indian Archipelago, vol. IV. p. 630,) "some of the inhabitants of the Island who dwell at the foot of the hills paid me a visit," and it may be inferred that these inhabitants had already laws of their own (liowever imperfect) from the fact that their Island formed part of the territory of the Kingdom close to the mainland and was a place valued by the ruler.

In the agreement subsequently made for the cession of the sovereignty of Penang, no provision was made for the law to be applied to the original inhabitants and therefore these fell into the general category for whom the Crown had a right to legislate. There was no lawful provision made on the subject of laws for Penang, for several years after its acquisition, either for Europeans or natives. Under the Act of 1773—13th. Geo III. c. 63, the Crown was authorized to erect a Supreme Court of Judicature in Bengal with jurisdiction over all British subjects in Bengal, Bahar and Orissa. s. 14. The same Act gave the Governor General in Council powers to make laws, for the good order and civil government of the Settlement at Fort William and the Factories and places subordinate thereto. s. 36.

Under the above authority, the Crown issued a Charter of Justice for the Supreme Court of Fort William, but the jurisdiction was so imperfectly defined that in another Act subsequently passed, (1800) 39 and 40 Geo. III. c. 79., the jurisdiction of the Court was extended over all factories, districts and places, which then were or which should hereafter be subordinate to the Presidency of Fort William and over all such provinces and districts, as may be annexed and made subject to the said Fort William. s. 20.

When Penang was settled it was doubted whether the jurisdiction of the Court ran, but the wording of the Section of the Act giving powers to the Governor General in Council to legislate appear to leave little room to doubt that Penang was included in the "factories and places subordinate." However the Governor General refused to legislate although repeatedly and urgently requested to do so by the Superintendent as well as the Judge afterwards appointed. On the 21-t June 1787, the Governor General in Council agreed, that it be left to Mr. Light to preserve order by confinement or other common punishment, except in cases of British subjects and in cases of murder. Persons, not British subjects accused of murder, were to be tried by Court Martial; nothing was said of Europeans. In 1794 a short Code of rules was sent down to Penang constituting a Court for natives .- After the passing of Act 39 and 40 Geo. IV c. 79-in the year 1800, there could be no doubt of the intention of Parliament to include places such as Penang in the jurisdiction of the Calcurta Supreme Court, and in the following year Mr. Dickens a Barrister was sent down as Judge and Magistrate with certain limited prowers, and as far as British subjects were concerned under the controll of the Supreme Court.

This Court continued in existence till the arrival of the first Recorder in 1808, who brought with him the Charter. Did this Charter introduce for the first time English law, or did it extend in any way the dates of the Acts before in force?

If the law of England did not extend on the first acquisition of the Island by the mere congregating of British subjects in a territory in which there was no law which could be binding on them, (whatever it might have been on the resident Malays) was it not specially introduced by the Act of 1800, omitting even the Act of 1773, which brought factories and places to be thereafter under Bengal within the legislative powers of the Governor General in Council? If it is

conceded that, as far as British subjects were concerned, the English law, had been introduced before the passing of the Charter how does that Charter affect those laws?

The condition of Singapore when occupied by Sir Stamford Raffies on the 6th of February 1819, was almost precisely similar to that of Penang 33 years before. The Island was covered by dense primeral jungle and the only cultivated and inhabited portion consisted of a few acres, at the mouth of the Singapore River. At that place the Tumungong, one of the chiefs of the Johore Kingdom, had established himself, with a few fishermen (accused of piratical habits), and there exercised a jurisdiction in accordance with the Malayan customs. The Island was held by the British for four years and a half, as a sort of feud under the King of Johore and it was not till the treaty of August 1823 that the sovereignty was finally made over to the East India Company (for the Crown). Singapore, from February 1819 up till June 1823, was not a Factory or place under the Presidency of Fort William in Bengal, but under Bencoolen, a place at that time if not a separate Presidency, as provided by 42 Geo III. c. 29., was at least a Lieutenant Governorship by powers to Sir Stamford Raffles, subject to the general controll of the Government General of British India. It may reasonably be inferred, however, that Singapore under Bencoolen might be held as sufficiently under the Government General but the circumstance is not important to the present argument, which is confined more particularly to the operation of subsequent Charters.

After the treaty of August 1823, Singapore is to be considered as a place acquired by cession, identical with Penang and only differing from Malacca in its antecedents. Malacca was finally ceded to the English Crown, by the treaty with Holland signed on the 17th of March 1824. This treaty and the disputed occupation of Singapore (disputes with the Dutch Government into which it is not necessary for the present purpose to enter) were ratified by Act of Parliament, 5 Geo. IV, c. 108. (1824) giving over to the East India Company. In the following year by 6th Geo. IV. c. 85. sect. This Section recites the arrangement for reducing Bencoolen from the rank of a Presidency to that of a Factory subordinate to Fort William in Bengal; and the Act last above recited 5 Geo. IV. c. 108., and that by virtue of 39 and 40 Geo. III. c. 79, the places Malacca &c., have become Factories subordinate to the Presidency of Fort William and are thereby (Sect. 20.) subject to the juri-diction of the Supreme Court of Judicature at Fort William, and then gives power to the Crown to make other arrangements by Letters Patent &c. for the administration of justice in Singapore and Malacca and to be exempt from the jurisdiction of the said Supreme Court; Sect. 21. authorizes the East India Company to annex Singapore and Malacca to P. W. Island, or other arrangements. On the 12th of October 1825, the Court of Directors is used an order annexing Singapore and Malacca to P. W. Island and petitioned the Crown for a Charter of Justice. On this petition, the first Charter of Justice dated 27th November 1826, was issued for the incorporated Settlements.

Malacca, unlike Penang and Singapore, before its cession was a cultivated and populous province under the rule of a civilized European Government, and here there could be no doubt of the effect of the cession on the laws. The laws must continue as before till altered by competent authority—that is, in this case, the Parliament and Crown. The laws were so altered in the absence of any stipulation to the contrary in the treaty of 17th March, and thenceforward, as to subsequent events, Malacca is placed on a par with Singapore and Penang, but is not involved in the uncertainty experienced as to Penang and Singapore, as to the effect of the system of laws adopted in each of those places before the passing of their respective first Charters.

After the 17th of March 1824, the Act of Parliament 6 Geo. IV. c. 85., expressly says, (Sec. 19.) that Singapore and Malacca became Factories subordinate to Fort William, and therefore according to 39 and 40 Geo. III. c. 79. s. 20. subject to the jurisdiction of the Supreme Court. Penang had become so subject to the jurisdiction of the said Court at latest on the passing of that Act, 1800, if not before, on its first settlement, under 13 of Geo. III. c. 63. sec. 14 and 36, and see also the preamble of the Charter of the Calcutta Court. Therefore it appears that English law (that is the law of the Supreme Court of Calcutta) was in force at each of the three Stations before the publication of their respective first Charters, and on the analogy of the Indian Supreme Courts it would follow that each successive Charter does not of itself alter the pre-existing laws, unless so directed in the Charters themselves. Is there any part of the Charters to bear out such an opinion?

The Calcutta Charter of 1774, in its jurisdiction clause, says; the Judges are to have such jurisdiction and authority as the Judges of the King's Bench have in that part of Great Britain called England, in a subsequent section the Court is to be a Court of Equity to administer justice as nearly as may be according to the rules and proceedings of the High Court of Chancery in Great Britain, and in such manner and form and to such effect as Our High Chancellor of Great Britain doth or lawfully may. Again Courts of Requests and

Quarter Sessions are to be subject to the Court in the same sort, manner and form as the inferior Courts and Magistrates are by law subject to the Queen's Bench in that part of Great Britain called England.

Again the Ecclesiastical jurisdiction, the law is to be the same as that now used and exercised in the Diocese of London.

The Admiralty jurisdiction is the same in both Courts.

There are various restrictions in this Charter, as to cases between British subjects and natives, and between natives themselves, providing that cases are to be decided by the Mahomedan or Hindo law. Such restrictions are not found in any of the Straits Charters. English law is here introduced to all alike without reference to colour or religion. Beyond these restrictions what distinctions can be made between the provisions of the Calcutta Charter and any of the Straits Charters and if it has been decided, as it has, that the Calcutta Charter, most materially enlarging the powers of the Court, as it did, was not held to affect the laws to be administered under the Charter, how in similar circumstances can any of our Charters be held to affect the jurisdiction and laws settled by its predecessor when they are almost copies one of the other?

What is a Charter if it is not an act of legislation pointing out a rule of conduct &c., but merely affords the authority and means for carrying legislation into effect? Whereas previously to the passing of the respective first Charters for each of these Stations the inhabitants of each of the Stations were subject to and entitled to English law, but had to go to Calcutta for a machinery to put that law into motion. After the passing of the Charters, the machinery was provided at their doors for putting in motion a law already in force.

The Calcutta Charter and the Straits Charters give to the Judges such jurisdiction and authority as our Court of King's Bench and our Justices thereof respectively have and may lawfully exercise (by the common law in Calcutta) within that part of Great Britain called England—jurisdiction and authority to do what? to administer justice according to certain laws laid down for them,—according to the laws of the land,—and the laws of the land point out that when a place is settled by British subjects they take with them a certain proportion of the existing laws, and in cases of cession the Parliament and Crown are authorized to point out what laws are to be in force. Parliament and the Crown have not pointed out what laws are to be in force. They have merely given a machinery with jurisdiction and authority to carry out the laws (whatever they may be) already in existence; unless it can be shown that the mere act of passing a Charter of itself, without express terms, can be held to in-

tend the extension of the Common and Statute law of England at its own date. If this can be shown, we have then the law of Penang to date from 1807 and the law of Singapore and Malacca to date from 1826—but the Penang law would not alter on the passing of the Charter of 1826 nor the law at any of the Stations on the Charter of 1855.

It is unnecessary to consider the subject of the difference between British born and native subjects in the Straits since the passing of the Charter, as the Crown and Parliament have decided by that document that the laws are to be the same for all, in fact the only distinction being that the laws are to be administered in the same manner as in England as far as circumstances will admit. In the Straits the distinction as to who are British subjects does not obtain. Every person born in any of the Straits Settlement after their coming into the possession of the Crown will be considered as a British subject. The extremely small number of inhabitants at Penang and Singapore on the cession of those I-lands to the Crown made it unnecessary that any special permission should be made for them and the subsequent case of Malacca was apparently decided, in the absence of any treaty scipulation, on the supposition that as the Court had been found to work well at Penang, it would answer for Malacca also.

On the morning of the 6th February 1819, Singapore was in almost the exact situation of Penang 33 years before, as to population and cultivation. With the exception of a few acres about the mouth of the river the whole Island was wild jungle, but there was a greater show of legal authority in the person of the Tumungong, one of the native chiefs who resided there, and his presence is a proof, that before cession, Singapore had laws of its own. There is a further distinction between the cases of the two Islands. At Penang the British flag was hoisted on the first day of occupation (though not formally till the 11th of September) and all native authority from that instant ceased, while on the contrary Singapore was held under native authority till August 1823 or four years and a half, during which time justice was administered by English laws as to the trade of the Port, but in other respects the pre-existing native laws. There can be no reasonable doubt as to the operation of the first Charter of Justice passed for a Colony. It has been that all Colonies after conquest or cession, are subject to the Legislative authority of Parliament, by whose power, paramount (when both apply) to that of the King in Council, its existing laws may be wholly or in part repealed, and new laws or a new constitution imposed at pleasure, Clarke's Col. Law 10, citing Campbell v. Hall; Cowper 204. 1 Bl. Com. 103. 127., Stoke's Laws of Col. 4, 28, 29., and see I Chalm. Op. (These Settlements having been first occupied by the East India Company does not affect the argument in this respect, as all the acquisitions of the Company are held to be for the Crown; see the several Charter Acts 13, 33, and 53 Geo. III., 3 and 4 Will IV. and 16 and 17 Vic., 1 Chalm. Op. 44, 122.) Therefore Parliament has the right to legislate for these Settlements, all three of which have been acquired by cession; Penang in 1786 from the King of Keddah, Singapore in 1819 from the King of Johore, ratified, as far as might be considered necessary by Holland in the treaty of 17th March 1824, and Malacca from Holland in 1825 under the said treaty.

Parliament has legislated for all three at different times, for Penang under 39 and 40 Geo. III. c. 79. s. 20, by extending the authority of the Calcutta Supreme Court (before established, under 13 Geo. III. c. 63., by Charter, confining jurisdiction to Bengal, Bahar and Orissa) to all factories, districts and places then, or to be thereafter, subordinate to the Presidency of Fort William in Bengal, and to all Provinces and districts thereafter to be annexed and made subject to the said Presidency. Seven years after, in 1807, by virtue of an Act of Parliament, Letters Patent were issued constituting a Court of Judicature for P. W. Island, and withdrawing the inhabitants from the jurisdiction of the Calcutta Supreme Court. pore and Malacca were made over to the East India Company under 5 Geo. IV. c. 108, and in 6 Geo. IV. c. 85. it is expressly stated that the Colonies, Possessions and Establishments ceded by the King of the Netherlands (including Singapore, inferentially, according to our view in the present argument, and strictly, according to Dutch politics) had become Factories subordinate to the Presidency of Fort William, and therefore had been placed under the jurisdiction of the Supreme Court by 39 and 40 Geo. III. c. 79. The above declaratory statement is sufficient to remove any doubts as to the legality of the manner in which Singapore and Malacca were annexed to the particular Presidency named. It was provided in the 21st Section of the Act under consideration, 6 Geo. IV. c. 85, that the East India Company might remove Singapore and Malacca from subordination to Fort William and place them under Fort St. George or annex them to P. W. Island &c., and in Section 19 power was given to the Crown to make other provision for the administration of justice in Singapore and Malacca by Letters Patent &c. The Company, by order dated 12th October 1825, annexed Singapore and Malacca to P. W. Island, and in November 1826 Letters Patent issued extending the P. W. Island Court into a Court for the Incorporated Set-The Letters Patent recently published divide this Court into two branches.

It will be seen from the foregoing statement that all three Stations had been under English law before the passing of the first Charter for each. Penang from 1800, at least, under 39 and 40 Geo. III. c. 79. s. 20. if not from its first occupation under 13 Geo. III. c. 63, which Act, Section 13, extends the powers of the Court, to be established, over the Factories subordinate to the Presidency; though the Charter itself, in the jurisdiction clause, narrows it into Bengal, Bahar and Orissa. Singapore from the passing of 5 Geo. IV. c. 108, ratifying the treaty with Holland, if not from its first establishment under 39 and 40 Geo. III. c. 79; and Malacca from the date of the Company's order, 12th October 1825, under 6 Geo. IV. c. 85. s. 21, annexing to P. W. Island, and therefore placing it under the Law of the Penang Court, if it had not been under that of the Calcutta Court before.

Great distinctions must obviously be made between the case of British born subjects in these Stations and natives as to the law, but for the present purpose, it will not be necessary to enter at large into the question. Singapore and Penang were both almost uninhabited. and their inhabitants, except the insignificant number of descendants from the original occupiers, are to be considered as British Colonists in the largest sense, or aliens, placing themselves voluntarily under the law they find in force. It was doubtless from a consideration of this fact that the Crown decided on making the law of England the lex loci alike for all, though to be administered in some respects with due regard to the religious prejudices, customs &c. of a large majority of the inhabitants, that is treating these Settlements as acquired by occupation as they virtually were. In this our Court is unlike the Supreme Court in India, where, from political reasons, it was not considered expedient to extend English law to the natives. As before stated, Parliament has authority to legislate for all British Possessions, and in cases where, as in India, a local Legislature has been appointed that right still remains and is sometimes expressly reserved, 16 and 17 Vic. c. 95. But only in cases when a Possession is individually named, or included under a general description, can it be held that any Act of Parliament or series of Acts extend. 1 Steph. Bl. 102. The reason of this rule is obvious, as why should Parliament empower a local Legislature to make law, and then without consulting that Legislature, extend at once a body of law, in a number of which doubts must exist (and by whom are these doubts to be solved?) as to whether or not they are applicable to the peculiar circumstances of the particular Possession. If Parliament select a number of Acis, however great or various, and direct that they shall be held to extend to any Possession or group of Possessions no

objection could be taken, as the action must be taken as advisedly done not, can it be implied that the ordinary formal wording of any Charter represents such an advised action as would be necessary to extend all English Acts of Parliament passed previous to its date? Before the passing of the first Charter for each Station the British subjects alone were subject to English law under the Calcuta Charter, the Natives having their own law under that Charter; but after the passing of the first Charter in such Station respectively the law of England became the lex loci for all alike, without distinction of colour or religion; the Court having power, however, under the Charter to temper the law to a certain extent, that is the Straits Charter gave to the Judges of the Court directly a power or discretion exercised by all Colonial Judges, more or less, impliedly.

We have seen as above that English law existed for British subjects in all these Stations before the passing of the first Charter for each and a certain Charter law for persons not British subjects what effect then had the passing of either of the first Chasters, that of 1807 for Penang, and of 1820 for Singapore and Malacca on that law ? It does not appear by any written report that the question has ever been judicially decided in the Straits. It is a rational conclusion that when Parliament has given a Legislature to a Possesion to make law for that Possession in as full a manner as is done for India under 16 and 17 Vic. c. 95., its own power, or at least the action of those powers cease, unless under particular circumstances. In the case of a Possesion, however, where no provision was made for local legislation it would be otherwise as in the case of Gibralter. first Charter of Justice for that place was granted in 1720, applying to personal property only; a second in 1739 with enlarged powers; a third in 1752 in which the language of the second Charter was " used that the laws of England is the measure of Justice to be administered between the parties, as near as may be." Burge Col. Law. Prelim. XL, and Clarke Colon. Law 680. It has been decided, in Jephson a Riera 3 Knapp 150., that under these Charters the law of England as far as they are applicable are the laws of Gibralter. Even here, however, it is not said that the laws of England passed and to be passed. Clarke in mentioning the same place in another page 15, see note 5, "so in some Colonies not possessing Legislative Assemblies such as Gibralter to the whole body of English law as it existed at the time of the acquisition (1740) has been adopted." That it is in the absence of a Local Legislature the Parliament (British) was left to legislate, by passing special Acts or by Acts specially intended for Gibralter individually or as one of a number similarly situated. If then in such circumstances with 3 successive Charters each more,

extensive in its powers than its predecessor, it was held that the law of England applied only as that law stood at the first acquisition, how can it be supposed that in our case, three Charters, one following the other without any alteration in powers, and with a Local Legislature (the Legislative Council of India) to make laws for us, that each successive Charter introduces any fresh Acts of the British Parliament other than those specially intended to apply? The fact that Parliamentary provision has been made for the administration of justice in these Stations at times near their first occupation or possion by British subjects renders it unnecessary to examine the law which would have applied naturally without such provisions on the supposition that they had been legally as they were virtually acquired by occupancy, being then uninhabited.

June 13, 1859. Before Sir P. B. Maxwell Recorder. Mootoosamy v. Robertson.

This case was heard on an earlier day during the present sittings, but Judgment was deferred tid this morning.

THE RECORDER—The petition in this case alleges that the defendant, the Deputy Commissioner of Police, caused the plaintiff to be arrested on the 18th August 1857, and taken before Mr. Braddell, the Police Magistrate, who took bail for his appearance on the following day; that on his going to the Police Office next day for the purpose of appearing, the defendant arrested him, imprisoned him in a lock-up for eight days, and for the last five of those days deprived him of all food and water, until he fainted and became wholly exhausted; that after having been partly restored to consciousness and strength by medical aid, the defendant caused him to be further imprisoned for eight days, at the end of which time the plaintiff was taken before the Magistrate and discharged.

The defendant pleaded, first, not guilty; secondly and thirdly,—after averring that the alleged trespasses were done or intended to be done in pursuance of the Police Act, (XIII of 1856)—that the defendant did not receive a month's notice of action; and that the cause of action did not arise within 3 months.

The substance of the plaintiff's case and of his and his witnesses' evidence is, that instead of being suffered to appear before the Magistrate on the day for which he had given bail, he was arrested by the defendant and kept imprisoned for 16 days, during which he was repeatedly questioned, kept in solitary confinement, and finally, during a portion of the time, deliberately and intentionally starved by order of the defendant.

The defendant's version of the affair is that the man did appear before the Magistrate on the 13th of August, according to his bail bond, when the case was remanded to the 17th, on which day it was heard and dismissed; and that, though true it was that the plaintiff was for three days without food, and was found in a fainting state in his cell, yet that had arisen from his own act: that having caste objections to the prison fare, he had been at first suffered to receive food prepared by his friends, but that a letter having been discovered in his rice, the defendant had ordered that in future he should not be supplied with any other than the prison food, from which the plaintiff had obstinately abstained for three days.

The two leading questions of fact, then, that I have to consider are; ls, whether the plaintiff was imprisoned for the length of time he asserts, without having been taken before a Magistrate, or only for a few days and upon a remand; and 2ndly, whether the starvation arose from his own obstinate refusal of food, or from the defendant's having maliciously withheld it from him.

Upon the 1st point, there i ; first, the desendant's positive oath that he took the plaintiff and two men named Kathan and Irlappen, before the Magistrate on the 18th, and asked for a remand, in order to have time to look for the property, which remand the Magistrate granted; and that they were again taken before the Magistrate on the 17th, when the case was dismissed. Magness, the Inspector, who had then the charge of the lock-up, and whose duty, in that capacity, it was to keep the Charge Sheet, and place the prisoners in his custedy before the Magistrate, also swore that the case was heard and dismissed on the 17th; and he produced, in corroboration of this statement, the Charge Sheet in which, opposite to the charge, there are the words "dismissed, 17th August." A man of the name of Vellen, also, who took the plaintiff his food during a portion of his imprisonment, swore that the plaintiff was taken before Mr. Braddell the day after he gave bail, and was not confined longer than 7 or 8 Kathan, one of the persons mentioned in the Charge Sheet, swore that the plaintiff, as well as Irlappen and himself, did appear before the Magistrate on the 13th, were then locked up for 6 or 7 days, and then again taken to the Police Court and discharged. Lastly, Karim, a Police Jemadar, swore that the men were taken to the Magistrate on the 13th, and remanded for 4 or 5 days to give time for search. As far then as mere number of witnesses and positiveness of assertion are concerned, the defendant's case is strong enough. But when I come to examine the evidence of these men in detail, and compare it with other evidence, I find it impossible to place any reliance on what they state. The defendant himself, though swearing

positively that the case was heard on the 17th, and professing a distinct recollection of it, shews, when he gives his story in detail, that, even according to his own version, the hearing could not have taken place earlier than the 18th. After saying that the remand was ordered on the 13th, he proceeds to state that on the following morning he prohibited the supply of food to the plaintiff from his friends This was, then, the 14th. The next day—that is, the 15th—he says he was told that the plaintiff refused the prison rice; and two days afterwards which brings us to the 17th-he was told the man was Next day, he adds, the case was heard, that is, on the 18th of August. This difference of a day is not, in itself, very material, but it becomes worthy of notice, when the rest of the evidence is examined. Vellen says he gave the plaintiff his food on the 14th. and for two or three days after, without objection, and that then the letter was found. This could not have been earlier than the 16th. Two or three days after that, he goes on to say, the docter was sent for-which would be the 18th or 19th; and two or three days after that, the case was heard—that is, on the 20th at the earliest. There is no doubt, this witness' evidence as to the number of days is very loose. He speaks of 2 or 3, 4 or 5, 5 or 6 days, as if all these expressions meant the same thing. However, he was the man who carried the plaintiff his food, and if it be true that he brought it to him two or three times at least, before it was prohibited, the difficulty in believing that the man was discharged on the 17th is increased. According to Magness, the keeper of the lock-up, it was not till the 3rd day, that is, the 15th, that the food was stopped, and he says that the plaintiff was not more than 3 or 4 days without food in his cell—that is, till the 18th. This would carry the hearing of the case down to the 19th, at the earliest. But further, this witness whose duty it was to conduct prisoners to the Magistrate, has no r collec_ tion whatever of the men appearing in Court on the 13th. On the contrary, he says that the first time they appeared after the plaintiff was bailed, was on the 17th. Again, when we come to inquire who were the prisoners, and who the witnesses on the two days, we find fre-h discrepancies. As to the witnes-es, Kathan says that Alagapa, Irlappen, the Christian woman (Charlotte Edwards) and Karim were examined on the 13th, and that, on the 17th, not only was Charlotte Edwards questioned, but also the two prisoners, himself, Kathan, and the plaintiff-an unlikely occurrence. Magness, who recollects only what he says passed on the 17th, says that both Charlotte Edwards and Kathan were examined on that day. This Charlotte Edwards, I may observe by the way, was not called, and though something was said about her being ill, no evidence was offered on the subject. Then,

as to who were the prisoners; Kathan save, that they were, on the 13th, himself, the plaintiff and Irlappen. Vellen says, they were the plaintiff, Kathan and Alagapa. According to Kathan, they were, on the 17th, the three men he had already mentioned, together with Alagapa. Magness says they were on the 17th, Kathan, the plaintiff and Irlappen. The entry in the Police Sheet stands thus: In the same line with the date and the number of the case stands the name of the plaintiff, above it, in much darker ink, is the name of Kuthan; and below, that of Alagapa, with "17th," prefixed to it. Both Alagapa and Irlappen, who were convicts at large, deny that they ever appeared before the Magistrate at all; and their denial is entirely borne out by the next evidence to which I have to refer. If it be true that the different persons mentioned appeared either as witnesses or prisoners, it is natural to inquire what evidence there is in the Magistrate's books in support of the fact. If the case was twice before the Magistrate, as alleged by all the defendant's witnesses, and if witnesses were examined on both occasions, as asserted by most of them, the Magistrate's Charge Book, and his clerk's Note Book must contain some notice of it.

Now, the Charge Book does contain an entry of a charge preferred by one Charlorte Edwards against Kathan and the plaintiff-but no mention of Irlappen or Alagapa-dated the 13th of August, for having fraudulently obtained, and for fraudulently detaining a watch and other property valued at 61 dollars; Mr. Foston, the Magistrate's clerk, says, on the morning of that day from the Police Sheet; and opposite to it, in the column for entering the Magistrate's decision, is the word "dismissed." Mr. Foston says, that it is his invariable practice to take a note of the evidence in very case, however trivial. But even if it be supposed that he occasionally neglects to do so, it is not likely that he would be thus remiss in a case like this, which the Magistrate could not dispose of summarily, but must send up for trial at the A-sizes. If, therefore, any witnesses were examined on the 13th or 17th of August, a note of their evidence must have been taken by Mr. Foston. But there is no such note. He was in Court on both days, as appears from his notes of other cases; but his Note Book does not contain a trace of this case untill the 4th of September, on which day a charge of fraudulently detaining the property in question appears in the Magistrate's Charge Book against the plaintiff alone. by Kathan; and Mr. Foston's Note Book contains the evidence given on that day by that man. In this note there is no reference to an earlier hearing. Mr. Foston says, indeed, that the Magistrate sometimes gives time to the Police, when their evidence is not ready, in which case no note is regularly made in either the Charge Book or

Note Book of the remand; and it was contended by the defendant that, with this explanation, the Charge Book was not inconsistent with his representation that the case was called on, on the 13th, and remanded to the 17th, to which day the word "dismissed" must therefore be referred. But still the question remains, where is the evidence taken on either of those days? Where is the evidence which Magness and Kathan say Charlotte Edwards, the prosecutrix, gave? Magness, indeed, says he observed that though witnesses were examined, the Magistrate took no note; but it is not his habit to do so. It is the clerk who takes the note; and where is Mr. Foston's note! I must say that the absence of all note on the 13th and 17th in Mr. Foston's book, throws serious doubt, in my mind, on the s atements of those who as ert that the case was gone into on the second, if not also on the first occasion, and strongly confirms the ascertion of the plaintiff that he was kept imprisoned for a much longer period before he appeared before the Magistrate. It also confirms his account of what occurred when he did appear, which is, simply that he (alone) was taken before the Magistrate, that Kathan was questioned, and that he, the plaintiff, was then told to go away. In support, however, of the assertion that the case was dismissed on the 17th, the Charge Sheet is relied upon; and there, unquestionably, in the last column opposite to this case, stand the words "dismissed 17th August." Now this entry invites some attention. The words just cited? in the first place, are in very much darker ink than the rest of the entry, except the word "Kathan", which however, I have no doubt, stood in the book on the morning of the 13th, for Mr. Foston copied the charge from this sheet. The ink used on the 17th in the other parts of the book certainly appears much paler now than either " Kathan " or "dismissed 17th August", much paler for instance, than the words and figures "17th August" which appear in the very same entry. I see, indeed, another entry in the same page, on the 13th in ink as dark as the words in question, and therefore it is not improbable that the words "dismissed" and "Kathan" were written on the 13th. But with respect to the "17 August" which are written immediately under that word, I have more doubt; for I do not find, as I just said, any dark ink used elsewhere on that day. The rest of the page, and many of the succeeding pages are all written in paler ink. Bearing in mind, then, that this book is in the possession of Magness, or of some other person equally under the control of the defendant, that there was therefore no physical obstacle to the addition of those words at any time, I am unable to attach any weight to their presence, in the face of the strong evidence which entirely contradicts them. Before leaving the subject of books,

I have one more remark to add. Magness says, that the name of every prisoner is entered in a victualling book, together with the day of the month on which food is given him. If he does not take his ration, his name is nevertheless entered, and a remark is entered opposite his name to that effect. This book I understood him, to say shows the exict number of days that every prisoner is confined, and if the plaintiff had not been confined later than the 17th. I cannot help thinking that it would have been produced. But assuming that it were provisionally established that the plaintiff was taken before the Magistrate on the 13th and 17th, how does the defendant explain that entry of the 4th of September to which I have already referred? It is quite clear, that unless Mr. Foston be as given to fiction on some occasions, as we must suppose him to be to negligence on others, (if Magness speaks the truth when he says that Charlotte Edwards and Kathan were examined on the 17th.) a charge against the plaintiff in respect of the same property was heard on the 4th of September. Magness is the only witness who offers an explanation of this. After his discharge on the 17th, he says, the plaintiff was again arrested. This, he says, was again done by Karim, who brought him in on the forenoon of the 4th, and took him at once to the Magistrate, by whom the case was gone into and dismi-sd on the same day. This remarkably speedy justice, however, not only supposes a third appearance before the Magistrate by Kathan as well as the plaintiff-and Kathan does not allude to any thing of the kind-but it is entirely contradicted by Karim, the supposed captor. This man says, indeed, that he did afterwards arrest the plaintiff, (which the plaintiff admits to be true,) but that it was five monthsor, as the defendant will have it, seven months after. Besides, although the charge in September, is written in Mr. Foston's hand, the names of the prosecutor and accused are written in Mr. Braddell's; from which it would seem as if the clerk had learned on the morning of the 4th that the charge of the 3rd of August would then be gone into, but had not yet learned who were to be the parties. must say, Magness' explanation entirely fails; and the charge of the 4th September throws the strongest doubt, if not entire discredit on the defendant's story that the plaintiff was released on the 17th of August. In short, then, we have the witnesses disagreeing as to who were the prisoners and who the witnesses in August; the story of the second capture in September contradicted by the pretended captor as well as by the plaintiff and the prosecutrix of August not forthcoming nor the food roll of the prison. On the other hand, we have not only the defendant's representation of the facts denied point blank by the plaintiff, Rungama, Alagapa and Irlappen, but their denial

strikingly corroborated by the books, of the Magistrate's Office. Upon the whole of the facts, then, I can come to no other conclusion than that when the case was called on before Mr. Braddell on the 13th, he was told that there was no evidence against the parties, and the case could not be proceeded with, and that he thereupon dismissed it, as it was his plain duty to do; or it may possibly be that he postponed it to the 17th, when he dismissed it for the same reason-But I do not believe that the plaintiff was on either occasion before the Magistrate. I believe that the defendant caused the plaintiff and others to be detained from the 13th for the purpose of making further investigation, and, as I shall have to state presently when I come to the evidence bearing on the subject, for the purpose of extorting a confession; that he ultimately made up his mind to shape the charge against Mootoosamy alone and make Kathan prosecutor, and that he then had the plaintiff arraigned before the Magistrate on the 4th of September. There is unquestionably this difficulty in this theory of the case, that the period of confinement would then have been 22, and not 16 days as represented by the plaintiff and it is improbable that he should have forgotten the exact length of time of his imprisonment, and still more improbable that he should have designedly understated his case when suing for damages. But it is easier to believe this than to believe the defendant's version of the facts in the teeth of the evidence to which I have adverted. But, after all, the decision of this case does not turn on this question The length of the imprisonment is but of secondary importance, compared with the second to which I now come.

The second question, then, which I have to consider is, was the defendant starved, and if so, quo animo? As to the fact and the duration of the starvation, there is no dispute. The defendant admits that the plaintiff was for three days without food, and though the petition says it lasted five days, the plaintiff makes out only three in his evidence. But whether of three or five days' duration, it lasted long enough to reduce the plaintiff to great weakness and to rendermedical assistance necessary. Now, the defendant's excuse is, that as the man was a Hindoo, he was at first allowed to get his food from home, as he would not eat what was touched by the Mahometau cooks and peons of the station; but that as his friends abused this indulgence, by endeavouring to send him clandestinely a letter concealed in his rice, the defendant had withdrawn his license, and ordered that plaintiff should have none other than prison fare. This, he says, was furnished to him. Both he and Magness swear that they saw it in his cell; but their statement is positively denied by the plaintiff. and I must here again observe that the defendant did not produce the

food roll. Its absence can lead to but one inference-viz: that its contents would not have supported the defendant's case. But assuming the story of the letter to be true, I do not see that it affords any excuse or even any intelligible explanation of the defendant's The commonest instincts of justice would have prevented him from punishing his prisoner for the misconduct of his friends. Even if he thought it necessary to close this means of communication between the latter and the plaintiff, it did not follow that he had no alternative but to drive the man to starvation-for he has been too long in the East not to know how strong are those wretched prejudices among Hindoos about their food, and that his order would be tantamount to a total prohibition of all sustenance. He says, indeed, boldy enough, that Hindoo prisoners never make any difficulty about the matter, but the experience of Magness seems more in accordance with the general belief on the subject; and according to him, the practice at the Police Station is, or was at that time and before Hindoo cooks were procured, that "when a Hindoo prisoner refuses to take the cooked food, he receives the food uncooked; and I have even," he adds, "once or twice bought a pot for them to cook it in." Now, according to the defendant's own version of the transaction, he knew day by day that the man was rejecting the prison diet. The day after his order, he says, he went into the cell and saw his rice there. "He said he would not eat." So that here we have the knowledge of the plaintiff's antipathy to food offered to him. and his rejection of it, plainly admitted by the defendant. Why did he then persist in refusing him even uncooked food, such as is given to other Hindoos? Why was not the food, prepared by his friends delivered to him after due examination? Why could not his motherin-law, who was hanging about the Police cells day after day during this horrible starvation, be given a handful of rice to boil for him under inspection, if the fears of communication were so strong? I see no satisfactory answer to the question, and seeing none, I am led to entertain doubts about the whole history of the letter. It affords no explanation of the defendant's conduct. Without going at length into an examination of the evidence as to its discovery. I think it noticeable that it is not pretended that the plaintiff was informed that it was on account of an attempt at correspondence, that his food was The defendant merely says he gave the order to his subordinates. Magness says, he did not tell the plaintiff why; and Rungawa says that when she complained to the defendant that her son-in-law would surely die if no rice were given him, she got no other answer than, "can't give;" but that he never told her why he refused, or that the plaintiff might have prison rice.

The plaintiff's account of the whole affair is very different; and if his evidence be true. I can come to no other conclusion than that his deprivation of food was a method deliberately adopted by the defendant to extort a confession. In the first place, the plaintiff says that he was repeatedly cross-questioned by the defendant about his having the property which he was charged with detaining. Magness "recollects something about seeing him once in Mr. Robertson's room; the latter was speaking to him about this matter." And the defendant himself, while positively denying the questions admits that he had the plaintiff brought to him the day after his arrest, when he told him that he had information against him that he had the watch, With what object was the man thus brought to him? to get this information? He knew it already. He had learned it when he was arrested and bailed. I believe it was, as the plaintiff states, for the purpose of being cross-examined. It seems to me tolerably clear that the defendant pursued with this man that odious system of questioning which I have already, on a previous occasion, had to say was condemned by our law. Whether that law be right or wrong is a matter with which the defendant has no concern. is enough for him to know that it desires that prisoners shall be guarded against criminating themselves, and not that they shall be entrapped or forced into doing so. Here, then, the defendant was plainly guilty of one gross malpractice. But according to the plaintiff, not only was he asked whether he had the property, he was also told that he had been betrayed by the father and mother of his wife. With what object could such a statement have been made, but as a trap to catch a confession. I am aware that the defendant denies this, and Karim, who is said to have interpreted between him and the plaintiff, denies it too; but their denial is by no means conclusive on the subject, and the facts are all in favour of the plaintiff's statement. Then not only was he questioned, as he says, but he was kept in a solitary cell during almost the entire period of his imprisonment. But what was the object of this treatment of a man whom the law presumed innocent? Simply to keep the man safe till evidence was procured? That would have been as well attained by leaving him in the ordinary lock-up with other prisoners. But the depressing influence of solitude on the mind was a powerful aid to the defendant's powers of cross-examination, and I cannot help believing that it was adopted for that purpose, for in this view it is consistent with the rest of the defendant's conduct. Here then we have two means assuredly well calculated to get an admission. What then is to prevent me from believing that it was for the same purpose that a third and still more efficacious means was adopted, and

that the man was denied all food in order to force him to confess? In this light, the starvation is intelligible enough, however horrible. And what is more, it is the only intelligible explanation that has been given of it. And why should I not believe that this is the true account of the transaction? Nothing but a reluctance to believe that such conduct is possible on the part of an official in any country under English rule. The defendant's explanation of his conduct is utterly inadequate, for the attempt to smuggle in a letter, could only have led to the man's food being searched, or to his receiving an uncooked ration like other Hindoos, but not to his being starved. The starvation, too, was not the result of forgetfulness or neglect, for the defendant's attention was called to it. He visited the starving man in his cell and let him go on starving. The plaintiff's story is consistent and intelligible, but if true, it stamps with disgrace all who have been parties to such abominations. In any view of the case, the defendant's conduct was inexcusable, and if it be pretended that he was actuated solely by zeal to bring a criminal to justice, I can only say that the law makes no allowances for a zeal which takes no account of human suffering, and displays itself in acts of barbarity on the weak and unresisting. The plaintiff's treatment was barbarous to a degree that I should have thought impossible under English law, and had he appealed to the law for redress sooner, he would have recovered such an amount of damages as would have shewn how strongly the law of England repudiates such detestable acts. He has, however, delayed so long in bringing his action, that I can give him but a very moderate sum; and besides as I had on a former occasion to remark, I cannot help feeling that practices of oppression and illegality have existed for some length of time in this Police, and their long impunity is perhaps some extenuation for their conduct.

With respect to the pleas under the Police Act, I shall not now go into the law upon the subject, I did so very fully during the last Sittings, and I therefore confine myself to saying that I do not think that the trespasses complained of were done or intended to be done under the provisions of the Act. There will be judgment for the plaintiff with 200 dollars damages; execution in a fortnight.

BEFORE SIR P. B. MAXWELL, Recorder.

Vellayadan v. F. Wilson.

An employer is not justified in taking the law upon himself as to flog and imprison an agricultural labourer for absenting from his work without leave. A father might inflict corporal punishment on his child, so likewise a schoolmaster on his scholar and a tradesman or master, standing in loco parentis, on his apprentice moderately in the way of correction. (a).

PENANG GAZETTE, 1st OCTOBER, 1859.

This was an action for an assault. The plaintiff's petition alleged that he was an agricultural labourer in the employment of the defendant, and that the latter kept him imprisoned for several days, and then tied him up to a post and flogged him with a rattan.

The defendant pleaded not guilty; and also a special plea justifying the imprisonment and flogging, as merely that moderate correction which a master may inflict on his servant for misbehaviour, consisting in absenting himself from his employment without leave

Witnesses have been called on both sides.

THE RECORDER, in giving judgment, expressed his opinion that the plaintiff had a good deal exaggerated the ill-treatment he had received, especially in representing, as he had done at first, and until warned of the serious consequences of committing perjury, that be had been kept for ten days without food, whereas he himself had afterwards admitted, that the watchman used to bring him his rice regularly twice a day. When he found a man giving evidence in this way, he did not feel disposed to give credit to any statement made by him which was contradicted by other witnesses; and he therefore felt no doubt that the facts were as Mr. Wilson had represented them-that is, that the plaintiff left his employment, was brought back after five days, and delivered over to the custody of the watchman for five or six days, after which he appealed to the defendant to let him go to work, promising not to run away again, and that the defendant then had him fastened to a post and gave him some twelve or fifteen stripes with a rattan. The imprisonment did not appear to have been very severe, for the man admitted that he had sometimes left his place of confinement and gone to the watchman's house to cook his victuals: still less was it of that barbarous character which the plaintiff had at first attempted to make out. Still it was an imprisonment, and an imprisonment sufficiently irksome, too, to make the lazy Kling prefer working in the field with his changkol, and was illegal. So, also, the flogging was altogether unjustifiable, for even if he thought that the law gave the defendant any such authority over the plaintiff as he asserted in the second plea, he should still have held that the flogging exceeded all

⁽a) See Illustration "I" Section 350 of the Penal Code.

the limits of moderate correction. The plaintiff had probably exaggerated its severity, but there were two facts in the case beyond question—the flogging took place on the 1st of August, and the plaintiff's back was then, on the 27th of September, all marked and scored with the stripes.

But he was of opinion that the second plea was altogether bad, that is, defendant had no such power as he claimed. It was true some of our old law books, as Hawkins' Pleas of the Crown, spoke in general terms, of the power of a master to inflict moderate corporal punishment on his servant. But even if that were strictly correct. how did it apply to the present case? The defendant was not the plaintiff's master, nor the latter his servant. The one was a field labourer, the other his employer,—a totally different relation. But the law was laid down in the old writers too widely. Blackstone. while citing Hawkins, stated the power of correction as possessed only over an apprentice; and Chancellor Kent, after observing that the power in question did not grow out of the contract of hiring. said that Dr Taylor in his Elements of Civil Law justly questioned its lawfulness, and then himself limited it to apprentices and menial servants under age, in which cases the master was to be considered as standing in loco parentis. And this, as it appeared to him (the Recorder), was the true test. A father might moderately correct his child, and any person standing in his position, or to whom his authority is delegated, might do so too. Thus, a Schoolmaster might inflict corporal punishment on his scholar, and a Tradesman on his apprentice, in moderation. And there was a very good reason for this. In the first place, the power was given for the good of the child, rather than for that of the father or master. the next place, some such power was necessary from the nature of the relation between the parties. If the child or apprentice misbehaved, the father or master could not put an end to the relation, as a man could that between him and his servant. Even the master of an apprentice could not dismiss him or refuse to teach him any longer on account of his misconduct, and it was but right and necessary that he should therefore have some power to prevent the recurrence of misbehaviour to which he must continue exposed. But the relation of employer and labourer was totally different. It was a mere engagement on the one side to work, and on the other to pay for the work. If the contract was broken by the labourer, the employer had various remedies. He might bring an action for the breach of the contract: or he might dismiss the man, or he might proceed against him under the Act of George IV. and have him sent to the House of Correction by a Magistrate. It might be said that an action was out of

the question against a man not worth a farthing, and that to dismiss a coolie, was generally to throw away the advances made to him for his passage money. But there still remained the remedy under 4 George IV. which he had, sometime since, after much deliberation, held to be part of the law of this Settlement. influenced chiefly by the persuasion which he entertained that without some such enactment, it would be impossible to carry on the agricultural operations of the country. If it were said, that to proceed against a defaulting coolie before a Magistrate involved great loss of time and inconvenience—all he could say, was that that did not justify any body in taking the law into his own hands. From what he knew of the Province, he believed that the gentlemen who lived there and had the management of plantations were Europeans, chiefly Englishmen, and therefore they must know the way to redress any grievances that they might have If the law, as it stood was not stringent enough, they could appeal to the Legislature. it was badly administered, they could address themselves to the Chief-Executive Authorities, and suggest what they wanted. If the Magistrate did not sit often enough, or near enough for the general convenience, he had no doubt that their representations would meet, with due attention from the Governor. But what they could not and must not do was to take the law into their own hands. In this case the defendant had done so, and though he (the Recorder) was willing, on the one hand, to bear in mind that the defendant had some excuse for exasperation, still be could not do otherwise than inflict damages of sufficiently serious amount, to mark that the law did not tolerate the flogging of a labourer by his employer. It was necessary to protect those helpless men from a repetition of such treatment. He would only add that as this was the first case of the kind that had ever come before him so he hoped and had every confidence that it would be the last. Damages 45 dollars and costs.

> Before Sir P. B. Maxwell, Recorder. Peter Duggie v. Frederick Gibbons.

A CERTIORARI on the MAGISTRATE to produce a Conviction.

A mere informality in the drawing of a conviction is no ground for quashing it if the evidence bears out the case. An informal conviction may be cancelled and an amended one sent up.

Penang Gazette, 10th December, 1859.

Inspector Gibbons, with the sanction of his superiors, applied to the Court for a certiorari to bring up the Magistrate's conviction, which was excepted to for informality. From the copy of the proceedings furnished to Captain Sanderson and published by him in

this paper, it appears that the Magistrate convicted the Inspector of the charge of wrongfully and cruelly assaulting a European seaman, and sentenced him to pay a fine of 50 Rupees, to be given to the complainant as compensation for the injury he had received. On Gibbons stating that he could not pay it, the Magistrate ordered a warrant to issue for his commitment to the House of Correction for two months or until payment of the fine. The sentence was perfectly legal and formal according to Section 12 of the Police Act, which enacts that "for neglect or violation of duty in his office, and for any breach of the orders and regulations framed as aforesaid, every member of the Police, -besides being suspended or dismissed from his employment at the discretion of the Commissioner,-shall be liable, on conviction before a Magistrate, to a fine not exceeding 100 Rupees (which may be deducted from any salary then due to such offender), or to imprisonment, with or without hard labour for any time not exceeding 3 months." Section 105 enacts that when no other means of enforcing payment of fines and penaltie-imposed by a Magistrate of Police, under this or any other Act, is provided, the Magistrate is to issue a warrant for the distress and sale of the offender's goods. But if it shall appear to him, by the offender's admission or otherwise, that sufficient distress cannot be had, he may at once commit the offender to jail for 6 months or a shorter period, according to the amount of the fine, the commitment to be determinable on payment. The Magistrate being satisfied, from the Inspector's admission and otherwise, that he was unable to pay the fine, and that no sufficient distress could be had, ordered a warrant to issue for his imprisonment. In drawing up the formal conviction the imprisonment was, by a mistake of the acting clerk, entered as part of the conviction, which, from the proceedings, it clearly was not. A copy was furnished to Mr. Gibbons at his request and on this the Court ordered a certiorari to issue. When the Magistrate returned the conviction, he did so in a correct form, the law allowing him to amend mere informalities at any time before a return. The fidelity of the return to the actual proceedings was attested by the affidavits of the Magistrate, and of Dr. Scott, one of the witnesses present at the proceedings. The Court, after hearing the defendant, held the conviction to be good, and the subsequent order of imprisonment to have pursued the Act. Mr Gibbons, dissatisfied with this result, obtained a second certiorari to bring up the original record, and a rule on the Magistrate to show cause why he should not pay the costs. The Court was at first disposed to order the Magistrate to pay the Inspector's costs. on the ground that he had been misled by the copy of the conviction furnished for him. But on the authority of some strong cases cited by

the Magistrate, the application was dismissed, each party bearing his own costs of it. In one of these cases (R. v. Barker, I East, 185), as in the present, the Magistrate returned to the Queen's Bench a conviction drawn in a different and more formal shape than the original one, of which a copy had been delivered by the clerk to the person convicted. The latter applied for a criminal information against the Magistrate, but Lord Kenyon C. J. said

"If the magistrate has done no more than return the conviction in a more formal shape, instead of sending it up in the informal manner in which it was first drawn, and supposing that the facts as they really happened will warrant him in the return he has now made. I am of opinion, that it was not only legal but laudable in him to do as he has done; and he would have done wrong if he had acted otherwise. It is a matter of constant experience for magistrates to take minutes of their proceedings without attending to the precise form of them at the time when they pronounce their judgment, to serve as memorandum's for them to draw up a more formal statement of them afterwards, to be returned to the sessions; and it is by no means unusual to draw up the conviction in point of form after the penalty has been levied under the judgment, nor is there any legal objection to this method, provided the facts will warrant them in stating what they do. It is no answer to say, that a party convicted may be thereby induced to incur an unnecessary expense in suing out a certiorari, to get rid of an informal conviction; for a mere informality, in the manner of drawing up a conviction, ought not to be the inducement for removing it into this court, but some substantial defect in the justice and legality of the proceeding itself before the magistrate."

The principle to be gathered from this and subsequent cases is that, if the original conviction be legally unimpeachable in substance when pronounced, no mere informality in drawing it up is a ground for quashing it. It would appear to follow from this, that the defendant is bound to take notice of the substantial validity of the judgment, at the time when it is delivered. In the present case the Inspector had also learned, on the return of the first certiorari, that, in the opinion of the Court, the conviction was good. Further proceedings bear somewhat of a vexatious aspect, and if they were unwarranted it would seem to follow that all the costs should have been paid by the Inspector.

The Magistrate stated in Court that the attempt, first to quash the conviction for informality, and, second, to saddle him with costs, was really that of the Commissioner and his Deputy, with whose sanction the Inspector was acting. Possibly the letter from the Governor to which we have referred in another place, may have had some influence in bringing about this curious spectacle of an ex-Magistrate, notorious for the informality of his own judicial acts, and a Police administration equally noted for its frequent violations of the law itself, warmly and pertinaciously assailing a conviction, the substan-

tial justice of which they can as little question as its established le-The truth is, that those who have so long and so zealously laboured to imbue the Natives with the belief that the Police is above the law, who believe that the Executive approves of their illegal proceedings, and are assured that it will not visit the most flagrant outrages on the liberty of the subject, when done on pretext of catching culprits or confessions, with more than a formal censure, have created a standard of Police esprit and merit which every ambitious member of the force places before him. The only impediments to the full establishment of their arbitrary authority are the Judges and the Magistrates, and as they are rather formidable ones, the rule has been adopted that subordinates are to be maintained and defended against the legal consequences of arbitrary acts committed in the socalled furtherance of their duty, and that when the Courts, superior or inferior, uphold the law, they are to be sedulously accused of misjudging the facts or straining the Act, and fortunate is the Judge or Magistrate who escapes the imputation of malice or prejudice.

To the Editor of the Penang Gazette.

Dear Sir,

I beg you will give insertion to the accompanying depositions from the Magistrate's Office. You will see by them that an Inspector of Police recently appointed was guilty of brutally felling an inoffensive sailor belonging to my ship who was taking no part whatever in a common street row. When my Quarter-master took the man to the Magistrate, he was referred to Mr. Robertson, who told the poor man that he was "served right." The Quarter-master then went to the Magistrate, who granted a summons and you have the evidence and the sentence enclosed. Inspector Gibbons at first refused to pay the fine and was sentenced to two months' confinement in the House of Correction, but he paid the fine next day and is now in Police Uniform ready to deal out similar brutality to others. I ask you, is such a man fit to be a peace officer? He was dismissed from the Singapore Police for bad conduct and frequent acts of violence.

I am, Sir,

Penang, 7th November, 1859.

Yours faithfully,
John Sanderson,
Master of Barque Sanderson.

No. 704 Friday-4th November, 1859.

The Examination of Peter Duggie, Frederick Bowen, Joseph Burgess, Oaee Ah Hoon, Tamby P. P. 144, and John Scott M. D., taken on eath, this 4th day of November in the year of our Lord one thousand eight hundred and fifty nine, in the Police Magistrate's Office at P. W. Island aforesaid, before the undersigned Magistrate of Po-

lice for Prince of Wales' Island aforesaid, in the presence and hearing of Inspector Frederick Gibbons, who is charged this day before me with assaulting and heating the said Peter Duggie, in Chulia Street, on the evening of the 30th October instant, at about 5 o'clock.

Peter Duggie, sworn states;—I am a seaman of the ship "Sanderson" now lying in the harbour. On Sunday last I came on shore about ½ past four o'clock and went to the Crown and Anchor, public house, where I had two glasses of grog. While I was sitting there another Frenchman commenced quarrelling with a Chinese, and a police peon came up and interfered to prevent them from fighting. I was standing some distance off, looking on, when I received a blow on the head which knocked me down senseless. I do not know how I received the 2nd blow on my eye and cheek (complainant exhibits a wound on the upper part of the head, and a contusion on the cheek and left eye which is black) when I recovered I was taken to the Station house, and brought before the Magistrate next morning on a charge of being drunk and disorderly. I will swear that I only took two glasses of grog that afternoon.

Taken before me,

(Sd.) GEORGE WINDSOR EARL,

Police Magistrate.

Frederick Bowen, sworn states ;- I live in Chulia Street, I lately left the ship "Princess Royal" and have had no employment since. I was Steward of that ship. On Sunday afternoon about 5 o'clock I was talking with defendant at the Pitt Street Station when a peon brought information that there was a disturbance in Chulia Street. defendant immediately went in that direction-I followed and on the way defendant received a policeman's staff from a peon whom he met. He had nothing in his hand when he left the Station-when we arrived near the Crown and Anchor we saw four Europeans struggling with six or seven peons who appeared to be endeavouring to take them into custody. Defendant in the first instance endeavoured to pacify the Europeans, but afterwards he struck at them with the Policeman's staff, and knocked down three of the 4 men. Prosecutor was one of the three that were knocked down. He was the first that was struck. I did not see any one of the four men strike at defendant before he knocked them down. The three that were knocked down were taken to the Station-house.

By defendant.—I did not see any person strike the three men besides yourself. I did not see any brick-bats thrown. I did not

see any of the peons strike the Europeans.

Taken before me.

(Sd.) GEORGE WINDSOR EARL,

Police Magistrate.

Joseph Burgess, sworn states; -I am living at the Crown and Anchor, public house, in Chulia Street. On Sunday last about 1 o'clock I do not remember the time exactly but it was in the afternoon, a crowd collected about the house to look at some French and Italian seamen, about fifteen altogether, who were drinking and amusing themselves in the front room; complainant was one of the number. One of the foreigners who is not present ran out brandishing a rattan, apparently for the purpose of driving away the crowd, who all retreated except one Chinaman who stood his ground, on which the foreigner struck him on the back with a rattan. The foreigner was not sober. The Chinaman abused the foreigner in English on which he struck him again and a fight commenced between them. Several peons came up to quell the disturbance. Complainant was present, and endeavoured to separate the combatants. He was perfectly sober, and had nothing in his hand-while this was going on defendant came running up with a Policeman's truncheon in his hand, with which he struck complainant a blow on the head, and while he was falling defendant struck him a second blow with the truncheon on the side of the face, defendant then struck another of the seamen and knocked him down also. About a dozen peons then dragged complainant and some of the other seamen towards the Station, and I saw one of the peons strike complainant with his fist several times while he was being dragged away insensible. The other man who was knocked down got up almost immediately.

By Defendant,—I saw the man who struck the Chinaman with a rattan running along the road with a peon on his back; the peon was endeavouring to pinion him and would not let him go.

Taken before me,

(Sd.) GEORGE WINDSOR EARL,

Police Magistrate

Inspector Gibbons—states in defence:—On Sunday last about 5 p. m. some peons came running to the Pitt Street Station and reported that there was a disturbance in Chulia Street. I immediately went to the spot and on arriving near the Crown and Anchor, I saw an European seaman running about with a peon on his back, I saw two or three other seamen trying to wrest a truncheon from a peon, and the complainant striking right and left at the natives, who had collected, I went up to him and put my hand on his breast, on which he struck at me, and I struck him with the truncheon, and

some of the peons took him to the Station. Several other of the European seamen were also arrested.

Before me,

(Sd.) GEORGE WINDSOR EARL,

Police Magistrate.

Defendant Calls.

Oose Ah Hoon, sworn states;—I live in Bishop Street; am a Carpenter. On Sunday last about 5 p.m. I was in Chulia Road when an European who is not present struck me with a rattan, and complainant struck me on the side of the head with his fist—defendant was not present then. Some of the peons tried to take the man up, who struck me with a rattan, into custody—defendant then came up, and complainant seized him by both hands, and struck at him, but I cannot say whether he hit him. The peon then ran for assistance and returned with some more peons. I did not see defendant strike complainant. Defendant had nothing in his hand.

Taken before me

(Sd.) GEORGE WINDSOR EARL,

Police Magistrate.

Tomby, H. P. 144—Sworn States;—I was present on this occasion and saw complainant there. Complainant took my coat and tore it,—1 then took hold of complainant's companion and complainant, they assaulted me and struck me on the side of the nose (no mark). Defendant then came and took some of the Europeans into custody—I did not see defendant strike any of the Europeans. My eyes were dark—(mata glap).

By Defendant.—My coat was torn by the complainant. Complainant was drunk.

Taken before me

(Sd.) George Windson Earl,

Police Magistrate.

John Scott, M. D., sworn states;—I have attended complainant for the last three days and have dressed a wound on his head which seems to have been inflicted by a blunt instrument, such as a piece of wood; the scalp was divided, but the bone uninjured,

Taken before me

(Sd.) GEORGE WINDSOR EARL,

Police Magistrate.

Sentence.—To pay a fine of 50 Rupees, all to be given to com-

Defendant, stating his inability to pay the fine, is sentenced to two months' imprisonment in the House of Correction.

(Sd.) GEGRGE WINDSOR EARL,

Police Magistrate.

1st March, 1860.

Before the Hon'ble Sir P. Benson Maxwell, Kt., Recorder.

Mat Pah Ali and Meh Salamah his wife versus K. B. S. Robertson. The Plaintiff Meh Salamah in person.

Mr. Allan for Defendant.

On this cause being called on, Mr. Allan said that before the trial proceeded, he begged to apply for leave to inspect any authority which the female Plaintiff has to institute this action.

The Recorder referred to Chambers v. Donaldson, 9 East, and refused the application.

Evidence for the Plaintiff.

Meh Salamah. - I am the wife of Mat Pah Ali. I was married at Kota in Quedah by Toh Bilal Kamar. My father was dead. No relation of mine was present. I had none at Kota, I had a brother at Permatang Bindahari. This was seven years ago. I have been living as his wife ever since. I have three children by him. I was married before, and had three children by my former husband, Lebby Mohit, who died before I married Mat Pah Ali. I lived at Kota with Mat Pah Ali. About a year and a half ago I left Kota, and was coming to my brother Awang's house at Permatang Bindahari. when I met Pungulu Nasib at Alor Nea on the Company's territory. as near to Permatang Bindahari as from here to the market. I called at his house. He detained me and took me to the Permatang Bindahari Station, about 8 or 10 A. M., I sat there for a while. told the peon I wanted to go to my aunt's house. Mah Yam, near where my brother lives. He allowed me to go. It is close by. I had been there half an hour, when Subadar Mat, a Policeman, came on horseback. On seeing me he said, "come let us go to Sungei Tumbus, as the Dato (Inspector Jeremiah) wants to examine you." I was six months gone with child. I had taken with me, that day, two of my children by my former husband, and one of Mat Pah Ali's. He took me to his house at Penaga. I did not take my children I asked to do so. He said, "never mind, I am going to take you for a little while, and you can return." We arrived at Penaga a little after midday, We remained half an Mour or so there, and then he took me to Teloh Ayer Tawar, I in a cart, he on horseback. Then I saw Pungulu Syed and two peons, who took me at once to the landing place. The Pungulu left me there. The peons put me into a boat and brought me to town, which I reached about 8 P. M. The peons immediately took me to the defendant's house. We went in a carriage for Mat Saman who came with us was unable to walk. He was lame. I saw the defendant. He said to me, "where is your husband." I said, I dont know, He said, "come along to the Police." Mat Saman, defendant and myself were put into a carriage, and we drove to the

Police Office. I was taken to a room where there were a number of men, Europeans among them. An European asked me in defendant's presence, "where is your husband gone to, how much property did he get?" I said, I don't know, "Where does your husband live?" -I don't know. He has run away. "Why wont you say where your husband is gone to?" I don't know. "How is it you dont know? If you will point your husband out, I will let you go. If not, I will shut you up and I will send you to Quedah.' I can't say whether defendant was present when this was said to me. The defendant did not say it to me. I was then taken and locked up in a dark room. A Nonia, the wife of Che Him, and Che Essa were there. I remained there next day and the next. I slept three nights in the Police cell. In the early part of the following afternoon I was removed by a peon, who took me to the jetty and put me into a boat which took me to the gun-boat. I did not see defendant on that day till I got to the gun-boat. Then I saw him. He said he was going to send me to Quedah. I said nothing. I cried.

We went to Quedah. I remained on board half an hour after the gun-boat anchored. The defendant beckoned to a man. I did not see, for I was below. While I was there a man came, and took me to the house of Wan Ismail. I did not see defendant there. I remained there for six months. I lived in Wan Ismail's compound. His wife said, "don't behave foolishly (tah katahuan) or the Europeans will get angry (Orang puteh marah)." I had been there about a month when my three children were brought to me by Che Tahir of Qualla Muda. At the end of six months Subadar Mat and my brother came and fetched me. They brought me to Permatang Bindahari. I lived at my aunt's there for a fortnight. Then my brother, and Jemadar Mat took me to the defendant. I forget whether at his house or the Police Office. It was to his house first. I did not speak to him nor he to me. My brother and the Jemadar took me to the Police Office. We went into a room, and I saw the defendant. Defendant produced a paper, laid it on the table and said, "put the mark of your hand there." I said how am I to do that? He said, "any way you like. If you don't, I will send you back to Quedah." The Jemadar said, "put it this way." He desired me to hold a pen, which I did, and taking hold of my hand wrote on a paper and said that was the mark. The paper was not read to me or explained. I did not hear it. I was six months with child when I was taken away. I was confined 3 months after, and taken away before the 40th day. In consequence of all this trouble my child died.

Cross Esamined.—My husband never threatened my life. I never said so. I did not run away from him. I was allowed, when

at Quedah, to go to the market. I could not have effected my escape. I would not have dared, because when I left the house to go to the village, my children remained at home. I did not want to run away. There was no body in the room when I put my hand to the paper, except defendant, my brother and Jemadar Mat. The paper was not read in my presence. I did not know what was in it. My brother has not given me 50 dollars, nor told me he has 50 dollars for me. Defendant asked me if Awang had given me 50 dollars. I said "tuan" (Yes). He said, 50 dollars for not bringing an action. I said "tuan." I did not ask what was in the paper. The paper I signed was smaller than this I don't know whether this is it. After signing the paper, I returned to my aunt for 4 or 5 days. My brother got angry with me, and he would not let me remain there any longer. I went to Kota. I waited till now to bring this action because it is only now my mind is open, (I have acquired sense) and hearing that Meh * had complained, I asked Mat Lutong what was the result of that action, and when I heard, I said I would go and complain too. My husband did not tell me to bring or not to bring this action. He said nothing I dont know where he is. I brought this action because I lost all my things and was driven to distress from the defendant's acts. [Mr. Allan was proceeding to cross-examine the plaintiff as to the nature of the articles lost, when the Recorder observed that their value could not be recovered as damages in this action.] When I came to Permatang Bindahari, it was to stay a few days with my aunt and brother on a visit. My husband had left home three or four days before. I was not in the jungle with him. There was a disturbance about my husband. People said he had robbed at Teloh Aver Tawar.

Pungulu Nasib.—I took her to the Station.

Subadar Mat.—I took the woman to Penaga. I did not see her again till I went for her to Quedah. It was in August I took her to Penaga. I swear I cannot recollect what month I went for her. As well as I recollect it was in December. The defendant told me to go for her. He gave me a paper to go to Quedah with Awang. He said, "give the Rajah this letter; the Rajah will give you Meh the sister of this Awang." Three days after I brought her back. I can't say whether she was three or six months away. When we arrived at Qualla Muda the brother and the woman landed there. I went to defendant. He said, where is that woman? I said, I left her at Q. Muda. He said,

^{*} Meh, the wife of Long, whose actions against Messrs. Robertson and Jeremiah for false imprisonment and deportation to Quedah, was compromised by the defendants paying her \$ 700 and costs.

"if she will come here. I will give her some backshish." Eight or ten days after the plaintiff came to my house and said, the defendant gave my brother 50 dollars for me which he has not given me. Defendant was there. He said, "on that day when you put your mark to the paper, you said, you had received it." She said, "I am in great distress now." The defendant said to me, "Mat give her 5 dollars." I never spoke to the woman about 50 dollars before, nor to her brother. I never made any proposition to her.

Cross-Examined.—I gave her 5 dollars. She went away apparently quite contented.

Pungulu Syed.—The woman was sent to me by Subadar Mat, I sent her by peons to town.

Mat Saad.—I live at Teloh Ayer Tawar. I was a Policeman. I took the plaintiff by Pungulu Syed's directions, with Mat Ali, to the defendant's house. I left her at his house, and then Ali and I went away.

Magness, Police Inspector,—I don't recollect seeing plaintiff until the morning we went to Quedah in the gun-boat. I went in the gun-boat. When we arrived, a Malay man came on board and took her away. Jeremiah and I were sitting together. Defendant was not present then. This signature is the defendant's.

A letter, dated the 13th, February 1859, from the defendant to the Rajah of Quedah was then put in. The following is the translation of the material portions of it, by the Court Interpreter, Mr. Symons:—

"After that, be it known to my friend the circumstance that now I have received information, stating that my friend wishes to send back to Pulo Penang the woman named Meh, whom the Recorder is making a noise about. With respect to that my mind is very much troubled to hear of it, bacause if the woman reaches Pulo Penang to the Recorder, then surely I shall be blamed and then Mr. Blundell will obtain shame from the circumstance that I assisted my friend.

"Now my mind is very much distressed respecting the woman Meh [the female Plaintiff] whom I myself have taken in the gunboat, the wife of Mat Pah Ali. Should that woman reach Pulo Penang that matter will be laid open. It is on that account that I herewith send Mat Subadar and the elder brother of Meh, named Awang, to come to my friend. My friend can deliver and give back the woman Meh as well as her three children into the hands of Awang her elder brother, that he may bring her back home to Pulo Penang, that it may prevent much noise upon me. Thus I inform."

Jeremiah, Police Inspector .- I saw plaintiff for the first time in the

gun-boat. Two Malays came on board and took her away. I did not interfere. They said, they had orders to take her away. She was not in my charge. I think, the defendant told me he was taking her to Quedah. I cannot recollect his giving any instructions about the woman. He told me he was taking her to be delivered up to the Rajah. I think he gave instructions to give her up to people who should come for her, but not to me and I don't recollect who to.

Evidence for the Defendant.

Martin Thomas.—I am the clerk of the defendant. I saw plaintiff at the Police Office. I saw her sign the paper produced. It was explained in Malay to her by the Malay clerk Mohamed Ali. I read it in English to him. She said, "I acknowledge to having received 50 dollars, and to avoid any more dispute, I sign this paper." She signed the paper and I left the room. This was ten or eleven months ago.

Cross-Examined.—Mr. Robertson told me to write this paper. It was the day before she came. I shewed it to Mr. Robertson before hand, it was partly my composition. Some alterations were made by Mr. Robertson. She came with her brother and there was a Policeman present. Mohamed Ali was also there. When she came in, I had the paper in my hand. I read a few lines at a time, the Malay clerk translated them to the woman. I translated in Malay to the Malay clerk, and he explained what I said to the plaintiff. When the translation was over, the defendant asked her if she had received the 50 dollars. She said, yes. The Malay clerk said, "to avoid disputes you are going to sign this paper." She put her mark to it. I gave her a pen. The piece of paper (wafered, by way of a seal,) was not there when the woman signed it nor when I left the room. I never saw the paper since.

It was then put in and is as follows:-

"To all to whom these presents shall come I Meh of Province

Wellesley send greeting. Whereas K. B. S.

P. W. Island

Robertson Eq. Deputy Commissioner of
Police of P. W. Island aforesaid, did on or about the 1st day of Sept.
last past cause me to be arrested and inprisoned in the Police Office.
of P. W. Island for the space of 24 hours and did on or about the same
date convey me and cause me to be conveyed to Quedah where I have
been detained since on a suspicion of being concerned in a gang
robbery at Teloh Ayer Tawar in the mouth of July last past, and as
he the said K. B. S. Robertson, Deputy Commissioner of Police for
P. W. Island aforesaid, did on the 16th Instant cause me to be released from my imprisonment at Quedah as aforesaid. And Whereas

I have good cause for action against the said K. B. S. Robertson Deputy Commissioner of Police for Assault and false imprisonment for my arrest and detention at Quedah as aforesaid but the same having been settled between us and I having received the sum of \$50 as compensation.

Now therefore I hereby willingly and of my own free will and accord do by these presents remise, release, discharge and for ever quit claim unto the said K. B. S. Robertson, Deputy Commissioner of Police for P. W. Island, his heirs, administrators and executors, all Actions and suits whatever against him the said K. B. S. Robertson or them for or in respect of the premises.

In Witness whereof I hereunto set my Hand and Seal at P. W. Island, aforesaid, this 1st day of March [February deleted] 1859. Signed Sealed and Delivered'

In the presence of

Mark of-A wang.

L. S. Mark of -Meh.

M. Thomas.

Awang.—I brought back my sister from Quedah. I took her to my house. I came soon after to defendant, who gave me 50 dollars. I gave them to my sister. When defendant gave me the money he said," I give this for the losses (damages) of your sister." When I gave her the money I said nothing. I said this is what the defendant gives. She held her tongue. I came to Mr. Robertson again with my sister. This time we went to the Police Office. A Malay and an European clerk, Mat, the defendant, myself and my sister were present. The Malay clerk held a paper and read it to me and Meh. I and Meh put our marks. I forget what the paper said. I went there on that day at Mr. Robertson's request. I gave my sister the 50 dollars in my own house. Nobody was present at the time. I swear I gave her 50 not five.

Mat Putch.—The plaintiff's brother came with me to the defendant who gave the brother 50 dollars. Afterwards, he and his sister came to defendant's room. Defendant said to her have you received from your brother 50 dollars? She answered, "Yes." She signed a paper. I heard it read. The Malay clerk held it in his hand and read it.

Mohamed Ali.—I am the Malay clerk of the Police. I saw Awang come with Mat Putch and receive 50 dollars. When the defendant gave the money, he said "these 50 dollars with respect to your sister having gone to Quedah, these are her expenses." Shortly after Awang came with his sister. Thomas read it to me in Malay and I explained it in the same language to the plaintiff. She was asked whether she had received the \$50. She said, "yes." Thomas told

her she was not to complain against Mr. Robertson any more.

Defendant.—I put the scal on the paper at the time she put her mark. Her finger was put upon the seal at the same time. Here are four other releases with similar seals. [The defendant held some papers in his hand, but they were not put in.]

Cross-Examined.-I took the woman to Quedah. She was brought to my house one day and I took her to the Police Station. She came, to the best of my recollection, one night at 8 P. M. She was in the Police Office that night, next day, the night of that day, and on the following morning, I think, I took her to Quedah. She was brought to me by a Police Officer, who brought a note in the Malay language. The note was, I think, written by Mat Subadar. I can't tell. It has been lost. I think it was translated. The policeman told me the woman was the wife of Mat Pah Ali, and that she had run away from Quedah to our Territory. I said to her, you hear what this man says; is it true? She said, "yes." I asked her where her husband was. She said "I left him in the jungle above Kota, where we fled from the Malay authorities. We were some days in the jungle, and had nothing to ear, and my husband wanted to kill me. I could stand it no longer and I ran away." I asked her what she was going to do. I said, I am going to Quedah. You had better go down to Quedah with me. She said, "baiklah" (very well) She said, how about my children? I said never mind them, I will send them. This about the children I cannot say whether it was at my house or not. It was before we went to Quedah. I took her to the Police Office in a carriage. I never told her that I would take her to Quedah if she did not tell me where her husband was. I never said I would deliver her up to the Rajah or the Malay authorities. I ordered her on board the gun-boat. I saw her, before that, at the Police Office. I don't recollect her being locked up. Nor whether any body was present. It was then, as well as I recollect, that she spoke abouther children. I can't recollect who spoke first. She said how about my children? I said don't be uneasy about them, I will send them to you. She said nothing. I had never seen her be. fore. She did not tell me how many children she had. She told me they were at Permatang Bandahari. I did not ask her with whom they were. She expressed no desire to go back to them. I did not observe that she was pregnant. I did not take her to Quedah as a prisoner †. When I got to Quedah I said to the Rajah, the wife

[†] Extract from Mr. Robertson's evidence in the case of Che Him v. Robertson and others, tried 7th March 1859. (Penang Gazette of 26th March 1859.)

[&]quot;Besides the prisoners sent up to trial 2 men and 3 women were arrested in connection with this burglary. One woman brought an action against me.

of Mat Pah Ali is on board the gun-boat; I brought her, and you had better send for her. He told one of his men to go and bring her up to him personally. The Rajah seemed much pleased on hearing she was on board. He said he would very soon get her husband as he had got her. I took the woman up to the Rajah for the purpose of getting her husband. I did not think about restoring her to her friends and country.

Mr. Allan then addressed the Court on behalf of the defendant. He contended that there was no evidence of coercion. The woman did not refuse to go, and she was not detained in such a way as to prevent escape. Here she made no resistance. At Quedah she was willing to remain. She had liberty to go to market. She was a free agent to go and to remain. She was an inhabitant of the Malay Territory, married and resident there. When the defendant wrote to the Rajah to let her come back, she was free. Then, to redress any injuries that might have been done, the defendant paid 50 dollars to her brother and she acknowledged the receipt of it. The receipt of \$50 showed that she had sustained no damage beyond that amount. She went to Quedah by the advice of Mr. Robertson and returned in the same free manner. He contended also that the 12th sect- of the Habeas Corpus Act was not law in this S-tilement.

Mr. Wilson-What became of the other two?

Mr. R. I decline to answer that question.

The Recorder. -On what ground?

Mr. Robertson-Because I may criminate myself in so doing.

The Recorder referred to the 32d. section of the Indian Evidence Act (2 of 1855) which enacts that a witness is not to be excused from answering any question relevant to the matter in issue upon the ground that the answer will criminate or may tend to criminate him, or expose him to a penalty. He thought the question ought to be answered. The whole issue here was the bona fides of the defendant's conduct, and the evidence was admissible on the same principle that proof of one felony is admissible on the trial for another, contrary to the ordinary rule, where the matter to be proved is the guilty knowledge of the prisoner, or the intent with which he did the act. Indeed, every question which goes to the credit of a witness is relevant to the issue.

Examination resumed.—The other two women were sent to Quedah. I took one up in the gun boat to Alor Sta. To the best of my recollection she was not locked up in the lock up.*

The Recorder-Did she ask you for a passage ?

Mr. R.—No. The woman was a prisoner. I did not take her before a Matrate, but took her to Quedah territory."

^{*} Mr. R. afterwards said that she had been locked up one night with another woman,

Judgment.

THE RECORDER said he agreed with Mr. Allan in thinking that the plaintiff could not succeed on the first count, because the section of the Habeas Corpus Act on which it was framed appeared not to extend to this country. The Section (the 12th) applied only to the imprisonment of inhabitants of England and Wales in other parts of the Queen's dominions or abroad; and it was fortunate-fortunate at least for the defendant-that it did not extend to Penang; for, besides giving the party aggrieved an action for damages of not less than 5001, against all persons concerned in the false imprisonment, or in aiding or advising it, it disqualified all such persons from holding any office of trust, and subjected them to the penalties of a proemunire. But although the personal liberty of the Queen's subjects in this Settlement was not protected by the Act of Charles II, it was protected by the Common Law; and that was enough for the purposes of this action, for there was a second count for assault, false imprisomment and deportation without reference to the Statute. The Common Law, at all events, was law here; and it not only gave redress in the shape of damages to those who were illegally arrested and carried abroad, but declared such an act a misdemeanour, trusted that the day was was not very distant when the law should be made less stringent in any English possession, and should regard with more indulgence than it now did every unlawful interference with the personal freedom of those who lived under its protection. did not know whether he viewed offences of that kind with undue severity, but unquestionably he did consider it an offence of the gravest character to seize a person, a woman especially, and carry her abroad and keep her imprisoned there for months for no crime, and without legal warrant. He would however say nothing more on the general question then, but would confine himself to the facts of the present case.

The action was brought against the defendant for having assaulted and carried abroad the female plaintiff and kept her abroad imprisoned for six months; and the woman's account of the transaction was, that, having come from the Malay territory to Permatang Bindahari, on the British territory, with her three children to visit her aunt or her brother, she was apprehended by our Police on the morning of her arrival, taken from her children, and passed on from station to station, until she arrived in Penang in the evening, when she was conducted to the defendant's house; that the defendant took her into his own custody from the Policeman who had brought her, and lodged her on the same night at the Police Station, where she was questioned about her husband, and where she remained for three

nights, after which she was carried by the defendant in the gun-boat to Quedah and delivered up to the Rajah of that country who kept her there for six months, when she was delivered up to her brother and a Policeman at the defendant's request. She said also that, when arrested, she was six months advanced in pregnancy. The defence to all this was, that no coercion was used; that the woman went to Quedah as a free agent, and remained there as a free agent; and the defendant's account appeared at first to invite the inference that he had acted in a pure spirit of kindness and compassion towards the woman. She had, he said, on being brought to him, told him that she and her husband had been biding in the jungle for many days to avoid capture by the Malay authorities; that she had starved; that her husband had ill-treated and finally threatened to murder her; and that, numble to endure this kind of life any longer, she had escaped from him and fled to the British territory. The defendant then said, that on hearing this story he had asked what she intended to do, and told her that he was going to Quedah and advised her to accompany him, to which she replied Baiklah, (very well) and that he had taken her to Quedah, in consequence, and taken her as a free agent and not as a prisoner. She had not, he thought, said any thing that night about her children, but he had seen her on another occasion before going to Quedah, when she had said to him, quite incidentally, "how about my children?", to which he had replied, "don't make yourself uneasy about them, they shall be sent after you"; and she said no more, quite sati-fied, he (the Recorder) was asked to presume, with the defendant's arrangements on her behalf. Now he did not besitate to say that he did not believe that story. It was denied by the woman and was wholly improbable. He would not easily believe that a woman just taken away from her children and burried across the Province to Penang by Policemen, at once accepted the advice of the defendant to accompany him to Quedah, without even saying a word about her children who were left behind, and that it was only afterwards that she had referred to them, and then only in a casual way, without even mentioning with whom they were to be found. Besides, if she had told any such story to those who first apprehended her, it is not likely that they would have seen in it any ground for arresting her and passing her on to the defendant. The story was told for the purpose of leading to the inference that it was out of pity for the woman, and as a service to her that she was taken to Quedah. poor woman, it was represented, ill treated, starved, and threatened with death by her husband, had fled for protection from his violence into the arms of the Police of Penang. Certainly it was a singular

way of responding to her appeal, to send her to the Police cells for two or three days, and then to carry her away from home and friends and give her up to the Rajah. But in truth, the story called for no comment. The defendant had, on further questioning, admitted that he had carried the woman to the Rajah of Quedah for the purpose of enabling him to catch her husband, and that the idea of restoring her to her country and friends had never occurred to him-This admission explained at once the true nature of the transaction, and shewed that the woman's account was substantially true. was probably not candid when she represented her coming to Permatang Bindahari as merely a casual visit for a few days to her relations. He believed that the truth was, as had been suggested to her on cross-examination, that she had fled from the Malay territory with her children to save herself and them from the imprisonment which awaited them there; if her husband did not surrender, and that she came to our territory in the belief that there, at all events, she would not be made to suffer for the surposed guilt of her husband: but that instead of finding that protection which the law gave her, she was apprehended, taken from her children, and carried off and delivered up to the Rajah of Quedah and kept in confinement there for months.

It was said that there was no coercion. There was no evidence that the woman resisted or struggled, it was true; but the mere absence of violence on her part did not shew that she was a free agent. The defendant had, however, himself furnished ample evidence to shew whether she was a prisoner or not. To say nothing of the paper which he had got her to sign, which had been prepared at his dictation, and been revised and corrected by him, and which stated that he had caused her to be arrested and to be conveyed to Quedah. there was the letter which he had written to the Rajah of Quedah in which he requested him to deliver the woman up to her brother and a Policeman,-the woman "whom he had carried in the gunboat, and whose case would be laid open if she returned to Penang." Why should he have written to the Rajah to send this woman back, if she had gone with him as a free agent? Why interfere then with the freedom which it was also said she was enjoying in Quedah? And why pay fifty dollars to prevent an action on her return? It was abundantly plain that the defendant had had the woman here for three, or, as he himself admitted, two nights, as his prisoner, and that he had carried her to Quedah as his prisoner. But it was said by Mr. Allan that she was free in Quedah, that she remained there The evidence was that she was there a month of her own free will. before her children were sent to her, that she was allowed to go to

the village market, but not to go about here and there in public lest the "orang putch", the white men, should get angry; that she certainly might have effected her escape, but that she must have left her children behind her, for they were always kept in the house when she went to the market, and she would not have dared to run away. Because this woman, in an advanced state of pregnancy, and afterwards burdened with an infant, might possibly have effected her escape, leaving her children behind her, he, the Recorder, was asked to believe that she remained in Quedah of her own free will, and in the enjoyment of perfect freedom. But this was not the defendant's own opinion when he wrote that letter to the Rejah. shewed that he knew that the woman was then a prisoner, and his prisoner too, kept in custody by the Rejah at his request, and to be delivered up at his request. That was the defendant's understanding of the matter when he sent her brother and the Policeman for her, and that was his, the R-corder's, understanding of it too. appeared to him then, that the defendant did imprison the female plaintiff and carry her abroad and keep her imprisoned there for the space of six months, and that the plaintiffs, consequently, had a good cause of action against him, as laid in the second count.

But the defendant had pleaded that that cause of action had been released before the commencement of the suit; and he sought to establish this by proof that the woman had executed the paper which had been put in. To this it was a sufficient answer that the female plaintiff was a married woman and incapable of binding herself by any such instrument. And the defendant had no right to complain of this as a hardship upon him. He knew perfectly well, when he took that release, that she was a married woman. It was as the wife of Mat Pah Ali that she had first been known to him. It was because she was the wife of Mat Pah Ali that he had dealt with her as he had. He could not therefore complain that any fraud was practised on him. Besides, this part of the transaction was very little like a regular and proper settlement between the parties. There was no evidence of any negotiation between them: no evidence that the woman or her husband was made acquainted with her legal rights and was offered, and deliberately accepted a sum of money to forego them. The transaction was simply this: the defendant sent, not for the woman, but for her brother, gave him 50 dollars, probably to give to the woman, and told him to bring her over a few days afterwards, to sign a paper, in order that she might not give the defendant any Whether the woman received the 50 dollars as her brother asserted and she denied, was not material. Nor was it material that she had admitted to the defendant that she had received them.

was enough that the deed was executed by the married woman, was not binding on her in law, and was no bar to an action at the suit of her husband and herself. The defendant had got all he had asked for, the release of a woman who, he knew, was married. There was a plea on the record denying the marriage; but this had been clearly established by the evidence.

It resulted then that the defendant was liable in this action for the false imprisonment of the female plaintiff, and the only remaining question was, what amount of damages he ought to pay. had said, at the outset, that he regarded the act of the defendant as a very grave offence: nevertheless if he were now trying him for the misdemeanour, he should probably be inclined to make the sentence a light one, for he knew-and he might import for the present purpose what he had learned out of Court-that the defendant had in consequence of this very case, as well as other matters, been already harassed and subjected to some anxiety of mind; and besides some little might perhaps have been done in the way of retribution. So, in the present case he thought it hardly necessary to inflict what were called exemplary damages, for he hoped and believed that after what had passed, there would be no renewal of such illegal malpractices as that now in question. But still this was a case in which it was necessary to give substantial damages. The plaintiffs had a right to say that though the defendant might not commit such acts in future, and penal damages were therefore not called for on behalf of the public, that they were nevertheless entitled to be properly compensated in damages for the particular injury inflicted on the female plaintiff. The woman said, and had a right to say, "I am not acting for the public interest, but I claim to be compensated for the injuries which I suffered from the defendant. He arrested me, carried me abroad, away from my children, and kept me imprisoned there for several months"; and, she added,—but he trusted that she had no good reason for saying it-"in consequence of the trouble which he thus brought on me,-confined in Quedah, and marched back here within forty days of my confinement,-I lost my child." Under all the circumstances, then, he should give such a sum as would, he believed, be a substantial compensation to the woman, while it would be light with reference to the defendant's breach of the law. But if he did not give heavier damages then, he hoped that it would not be understood that false imprisonment and deportation abroad were regarded lightly by English law and English Courts. That Malav woman was as much entitled to the protection of the law as any English woman, and it was the duty of her Majesty's Courts to let all her subjects know that they had that protection. He felt it his duty.

when he found any persons, more especially any of his own countrymen, sinking into low Asiatic notions with reference to the personal freedom of the subject, and the social condition of women, to bring them back to the English standard of opinion on such matters; and he trusted that in the Queen's Courts those questions would always be judged by that standard. There would be a verdict for the plaintiff with 250 dollars damages.

BEFORE SIR P. B. MAXWELL, RECORDER, Mahomed Dris versus Scott.

An action of false imprisonment will not lie against a Police Officer for arresting a person whom he suspected of having committed a felony. The law will protect him if he had acted bona fide and in the honest belief that he had authority to do so.

Any action or prosecution which may be brought against a Police Officer should be commenced within three months after the act complained of (a).

PENANG GAZETTE 26th NOVEMBER 1860.

This was an action for false imprisonment brought against a Police Inspector. The facts of the case and the pleadings will be found sufficiently stated in the Recorder's judgment.

The Ricorder said that the facts were, in the main, undisputed. The plaintiff, a Malay, was walking down the street at Penaga, between 4 and 5 P. M. carrying two Chinese changkoles over his shoulder, and a small bundle tied up in a handkerchief. When within a few yards of the Police Station, he was accosted by the defendant, a Police Inspector, who asked him his name, where he came from, and where he had bought the changkoles. The plaintiff answered, as the truth was, that his name was Mahomed Dris, that he came from Indramuda, and that he had bought the changkoles at Permatang Poh. Upon this, the defendant, with the assistance of a peon, arrested him, handcuffed him and took him to the Station. In his evidence, he stated at first that he did this because his suspicions were aroused by the circumstance that the changkoles were Chinese, and not such as are used by Malays. Afterwards he said that he had arrested him because he had a search warrant against a man of the plaintiff's name; and (the trial having been postponed,) he produced a warrant ordering the search of the house of one Dris (not Mahomed) for certain articles different from those found on the plaintiff, and the arrest of Dris, if any of the articles mentioned in the warrant were found there. When the plaintiff was brought to the Station, his bundle was examined, and was found to contain two pairs of Chinese trowsers and a Chinese purse. plaintiff also carried, strung to the waist string of his trowsers, a few

⁽a) See Section 42 of Police Ordinance I of 1872.

silver bangles, apparently those of a child. The defendant then made an entry in his Charge Sheet to the effect that he had arrested the plaintiff "under suspicious circumstances," having the property just mentioned "supposed to have been taken from the house of Lim Ki at Juru." It appeared that Lim Ki's house had been attacked and robbed one night, about a week before the arrest, and that he had been, himself, murdered. The defendant despatched the plaintiff, handcuffed, in the custody of two Policemen, to the Police Office at Butterworth, where he was locked up for the night. Early on the following morning, the defendant made inquiries at Indramuda and Permatang Poh about the plaintiff, and then went to the office and released him upon his own recognizance to appear before the Magistrate on the following day. This the plaintiff did, and he was at once discharged. The plaintiff now complained of this imprisonment. Healso alleged that he had not received any food while imprisoned but he (the Recorder) did not attach any weight to this complaint, for it did not appear that he had asked for any on the evening of his arrest, and he was disposed to believe the Police Sergeant, who said that rice was offered to him on the following morning. The plaintiff had admitted, on being pressed, that food had been brought intothe lock-up in the morning, but he said that he, as a Mahomedan, could not touch it, after Siamese and Chinese prisoners, who were shut up with him, had helped themselves out of it. On the other hand the Police Sergeant in charge of the lock-up, who was also a Mussulman, said that he had himself helped the plaintiff; and he (the Recorder) thought this w . p. bably the truth, as it was not likely that one Mahamedan would wantonly offend the prejudices of another in such a matter. The defendant had pleaded, first, the general issue, secondly, that the cause of action arose more than three months before action brought, and, thirdly, that he had received no notice of action. On the first plea the question arose whether the defendant had authority to arrest the plaintiff. A Constable had undoubtedly the right to arrest a man if he had reasonable cause to suspect that he had committed a felony, and the question on the first plea was whether the defendant had reasonable cause for entertaining such a suspicion respecting the plaintiff. But it was unnecessary to give any opinion upon it, because he thought that the defendant was entitled to succeed on the second plea. The 112th Sect. of the Police Act limited to three months the time for bringing actions for "acts done or intended to be done in pursuance of the Act." did not mean acts done strictly in pursuance of the Act, for such acts were lawful and did not need protection; and if the Act were so construed, it would afford no protection whatever where protection

was needed. It meant—as he had had occasion to shew in a case tried by him last year, on reviewing the authorities—all acts which, though unlawful, were done by the defendant bonâ fide and in the honest belief that he had authority to do that which had given a good cause of action against him. In other words, he was protected if he acted honestly and bona fide, and not capriciously, oppressively or in wilful disregard of the law. In this case, he (the Recorder)thought that whether the defendant had rea-onable grounds for suspecting the plaintiff of felony or not, he had, at all events, acted bona fide and in the honest belief that he had such grounds. His sending him forthwith to the Magistrate's Office, his immediate steps to make inquiries respecting the plaintiff at Indramuda and Permatang Poh, as well as his releasing him on the following morning, as soon as he had ascertained that his suspicions were ill-founded, were to his (the Recorder's) mind satisfactory evidence of the defendant's bona fides and honesty of purpose. The action ought therefore to have been brought within three months; and as more than that time had elapsed before it was commenced, the defendant was entitled to judgment.

, Before Sir P. B. Maxwell, Recorder.

The Queen versus, Eman.

On the trial of a prisoner charged with having committed murder on a Foreign territory an order of the Government under Act I of 1849 must first be obtained before the Court could take a judicial notice, otherwise the enquiry will be illegal.

Penang Gazette, 10th August 1861.

With reference to the ease of Eman who was charged with the murder of a man named Mun on the Perak bank of the Krian, the Recorder in his charge directed the Grand Jury that besides considering the evidence relating to the commission of the offence, it would be necessary for them to satisfy themselves that the prisoner had at some time or other resided in our territory for six months, and that the Government, that is the person or persons having Supreme Executive authority here, had ordered his trial by this Court.

In the course of the afternoon of Saturday, the Grand Jury asked to see the order for the trial, and they shortly afterwards returned into Court, when Mr. Bain, the foreman, observed that the document handed to them was a letter from the Secretary of the Governor to the Resident Councillor, and the Grand Jury felt some doubt as to whether it could be considered in the light of an order for the trial of the prisoner.

The Recorder observed that on a cursory glance he had some doubts on the subject, but for the present he would direct them that the let-

ter was a sufficient order, leaving the question suggested for consideration at a later period.

On Monday morning the Recorder said to the Grand Jury, that he had not seen the letter before coming into Court on Saturday, and had not had an opportunity of considering it, and when he had been called upon in the course of the afternoon to direct them respecting it, he had preferred telling them that the letter was a sufficient order reserving the question for consideration at a later stage to deciding at once in accordance with the opinion he had hurriedly formed, against its validity. But on consideration he thought it better to give the Grand Jury his opinion at once now that he had had time to form one upon it. He would remark that the Act of the Legislative Council upon which they were called to act, was one of a very stringent character, giving a power to the Courts of British India which was not possessed, he believed, by those of any other Country. The 2nd Sect. of Act 1 of 1849 declared that not only British subjects. and all persons in the service of the Government, but also "all persons who shall have dwelt for six months" in any part of British India and who shall be apprehended or delivered to a Magistrate there, might be tried for all offences wheresoever committed, if they were offences which our criminal law regarded as such. Thus if a Frenchman or German committed a crime in his own country and fled here, he would be safe for five months and twenty nine days, but as soon as he had been here for six months he might be tried for the crime The Act did not say that the residence was to take place before or after the crime, so that either would be enough; and if a foreigner passed six months here early in life, and then went away, and established himself in his own or any other foreign country, and committed a crime there, and then fled to India, he might be apprehended and tried immediately on his arrival. This enactment carried the jurisdiction of our Court further than was ordinarily recognised. the general rule in all countries being, that the jurisdiction of Criminal Courts was strictly local, and did not reach offences committed beyond their local jurisdiction, or at all events by any but subjects if committed beyond that jurisdiction. When therefore the Legislature extended their jurisdiction beyond that might be called its natural limits, it was necessary to take care that all the conditions for its exercise were strictly complied with. Now, the Act of 1849, after directing that the Magistrate should commit the prisoner and report the case to the Government, provided, by sect. 4, that "the Government may order the trial to be had" before a Court of competent jurisdiction; and the question was, whether there was any such order here. What was produced as such was a letter addressed

to the Resident Councillor by "Mr. Protheroe, Officiating Secretary to the Governor." But this was not a public officer, charged with the public duty of issuing and authenticating the orders of the Government, in the same way as the Adjutant General of the Army has the duty of issuing the orders of the Commander-in-Chief, or as a Colonial Secretary has, with respect to the orders of the Colonial Government. This gentleman was only the private Secretary of the Governor, that is, his amanuensis, and he (the Recorder) doubted much whether any order signed by him could be considered as an order of the Governor. However, assuming for the present that he was wrong here, the next question was whether this letter was an "order that the trial be had" before this Court. It was not addressed to the Court, but to the Resident Councillor, the chief local exedutive officer; but this might pass, as the Act did not in terms require that it should be so addressed. The letter said that having submitted a letter of the Resident Councillor "for the consideration of His Honor the Governor," the writer had been directed—and here, in passing, if he were inclined to more verbal criticism, he might observe that it did not say by whom the direction was given-"to desire, that with reference to Sect. IV. Act I of 1849, the prisoner Eman may be committed for trial before H. M's. Court of Judica. ture at Penang." Committed for trial: but this was not what was wanted; it had been already done by the Magistrate. The man had beed committed for trial long ago, and what the Court now required before it could act was an order from the Government to try the man already committed. The Act, in short, said that the prisoner was to be committed and that the Government might order the trial, the government did not order the trial but merely directed the local Executive Officer to send the man up for trial, leaving the Court without any direction on the subject. It might be said that the reference to Sect. IV. plainly shewed that the Governor intended to make an order under it; but it is enough to say, that if so, quod voluit non dixit. But even if an order could, in a matter of this kind, be spelt out of this letter by inferences, he should be inclined to say that the Governor had not intended to make any order; because he shewed that he had the Section in question before him, and he abstained from ordering that the Court should try, but merely directed that the Resident Councillor should commit the prisoner. For this reason, therefore, he must direct them that the letter was not an order from the Government for the trial of the prisoner before this Court, and without such an order they would exceed their, jurisdiction if they found any bill. There was another difficulty, however, which had occurred to him in considering this Act, and which

he thought he ought to take that opportunity of mentioning, in order that there might be no obstacles to the trial on a furture occa-The IVth sect. said that "the Government" should make the order; the Sth sect, defined that expression to mean "the Governor or Governor in Council or other person or persons having Supreme Executive authority in the presidency or place" &c.; and the 9th provided that the power in question might be also exercised "by any Commissioner or other person acting in the Civil Service of the East India Company, to whom the Governor General in Council shall have delegated authority to receive reports and give orders, in cases within this Act." The question was whether the Governor of this Settlement fell within either of these sections, and this was a matter of fact on which he (the Recorder) was at present ignorant. It was a matter of history that the Government of this place was formely like that of Madras and Bombay. It was a Presidency, and the Governor, no doubt, had then the same functions and power as the Governors of the Indian Presidencies. But that Government had been abolished, he believed, in 1829, when a Resident was appointed. and the settlement was made a dependency of Bengal, that is, its Government was tramsferred to the Governor of Bengal. The title of Governor was soon afterwards given to the Resident, but that was. he believed, for the single purpose of enabling him to sit in the Court of Judicature. This place continued under Bengal till about 1852. when it was placed under the immediate control of the Governor General. The Governor was not a Governor in the sense which was attached to the term when speaking of the Governor of any our Colouies, that is, he held no commission from the Crown delegating to him the Supreme Executive authority in the Colony. He was appointed, he (the Recorder) apprehended, by the Governor General, and the doubt which he felt was whether the Governor was not, therefore, in fact rather a " Commissioner or other person acting in the Civil Service of 'the Indian Government, spoken of in the 9th sect. than "a person having Supreme Executive authority" mentioned in the 8th; and if this were so, then it would be important to know whether "authority" has been "delegated" to him "to receive reports and give orders in cases within this Act."

All these matters were perhaps trivial in themselves, but they were not so when considered in connection with such a case as the present. The man committed for trial was charged with murder, and in a matter of life and death it was of the last importance to the Court to see that it clearly and beyond all possible doubt and cavil had jurisdiction. If it put to death a man over whom it had no jurisdiction, it did an act which was too serious to be contemplated.

23rd March 1861.

Before the Honble Sir P. B. Maxwell, Recorder.

LAWRENCE NAIRNE vs. THE RAJAH of QUEDAH and WAN ISMAIL,

A Foreign Sovereign although a natural born subject by our peculiar law, cannot be sued in our Courts if he has not acted or done anything by which it might be inferred that he acted as a subject.

Query.—Can a person be considered a subject after he has been recognized as an independent Sovereign. (a)

Semble.—In a suit against such a person it is not necessary to state in the declaration or bill, that he is amenable to the Court's jurisdiction, as this is a matter that should come from the other side; and if the plea does not say he is a Sovereign and as such is exempt from the jurisdiction of this Court it must be presumed that he is not one.

The case stated in the Bill sufficiently appears in the first part of the judgment. The Defendant pleaded to the jurisdiction which was as follows:—

The plea of Sultan Ahmed Tajudin Mokaram Shah, bin Sultan Zain al Rashid, who has been erroneously sued by the name of Ahmed Tajudin bin Sultan Zain Noor Rashid and by the description of Governor or Ruler of Quedah, to the Petition of Lawrence Nairne, Plaintiff.

This defendant by protestation not confessing all or any of the matters or things in and by the said Petition set forth and alleged to be true, for plea to the whole of the said Petition, in so far as the same doth concern this defendant, saith that this defendant before and at the time of the commencement of this suit was, and still is, a Sovereign Prince, that is to say the reigning Sovereign of the kingdom of Quedah, a state tributary to the kingdom of Siam, and that by reason of the premises he ought not to be compelled, against his will, to answer to the said Petition in this honorable Court, or to any suit or action in respect of the matters in the said Petition mentioned, before any Judge or in any Court whatsoever. Wherefore this defendant doth plead his said sovereignty in bar to the Plaintiff's Petition, in so far as the same concerns this defendant, and prays the judgment of this honorable Court whether he should be compelled to make any further answer thereto.

The plea was set down by the plaintiff for argument; and the plaintiff in person and Mr. Braddell for the Rajah of Quedah were heard on the 25th and 27th February, and 2nd March, 1861.

The Plaintiff contended that, on the pleadings two points arose for the consideration of the Court. First,—Whether the Rajah who was born in this Island and was thereby, prima facie, a subject of the British Crown and under the jurisdiction of this Court, became wholly exempt from such jurisdiction by having since been created an independent Sovereign? Secondly,—If he is not wholly exempt from the jurisdiction but is subject thereto with regard to certain matters, then, whether the Bill discloses a case in which a person filling the two characters of Sovereign and subject is liable to be sued as such subject.

⁽a) See Broom's Legal Maxims, page 72.

As to the first point it was laid down in Calvin's case, 7 Reports 10, 31and see 2 Stephen's Commentaries 413—that a natural born subject is one who is born within the dominions of the British Crown, whether within United Kingdom or the territories thereto belonging, of parents who are either natural born subjects or aliens and foreign born, or, as Stephen has it, stranger-born, provided the alien parents were not at the time of birth in enmity with the Sovereign of the birth place. There are two other exceptions to this general rule of one, the children of the Sovereign and the heirs of the Crown, who wherever born, are held to be natural born subjects, and the other the children of Ambassadors. But with these three exceptions the common law holds all persons born within the Queen's dominions to be natural born subjects, and therefore the Rajah having been so born, is a natural born subject, the law presuming for the general rule and not for the exceptional case, which, if any, must be pleaded for him. The Court will take judicial notice of the sovereignty of the Rajah, which is admitted for the purpose of this argument, and perhaps of the time when he came to the throne. but it will not take judicial notice of the date of his birth or where that happened, and whether or not the Rajah was then the son of a Sovereign, or of any other facts which would make against the effect of his birth according to the general rule.

The Rajah of Quedah in 1821 was expelled by the Siamese Government from that country and took refuge with his family in Penang. The Siamese held the country till the middle of the year 1842 when the Rajah was reinstated in the Government. This was the grandfather of the present defendant. While in Penang Tunku Dai, the third son of the old Rajah, married here Wan Mas Eran the daughter of the Bindahara of Quedah, and their issue, to the number of 6 or 7, were all born here on British ground. There can be no question as to the nature of the occupation of Quedah by the Siamese. The defendant was born during the occupation of Quedah by the Siamese, and the nature of that occupation is shewn by the treaty between Siam and the East India Company concluded in 1826. By Article 13, the English engage that they will not permit the Rajah. who is styled the former Governor, to attack, disturb or injure in any manner the Territory of Quedah, which is there stated to be Subject to Siam, and in another part of the Treaty (Art 10) is termed a Siamese country; the Siamese engage to remain in Quedah and take proper care of it. It is also stipulated that the inhabitants of Quedah and Penang shall have trade and intercourse, and that the Siamese shall levy no duties upon certain articles of food required by the inhabitants of Penang, and shall not farm the mouths of the rivers of Quedah &c. The country of Quedah was permanently occupied and treated as part and parcel of the territories of the Siamese Em-This part of the treaty not only remains unrepealed, but has had renewed effect given to it by the late Treaty of the Home Government with the Siamese confirming the above provisions.

After the defendant's grandfather was driven out of his country and during the 20 years of his exile he certainly was not King de facto, and whatever his claims were; the British Government recognized them not, but on the contrary supported the Siamese authority in Quedah; in the same way that the British Government now recognize that French Empire under Napoleon the Third. The issue of a son of his Louis Phillippe born in England would be considered not as a French but as an English subject.

By the law of England a natural born subject can never divest himself of that character without an Act of Parliament. Bowyer's constitutional law, 402.

In the case of the Duke of Brunswick v. the King of Hanover, 6 Beavan, the Master of the Rolls decided, that the inviolability of the King of Hanover as a Sovereign Prince was modified by his character and duty as a subject of the Queen of England; that he was exempt from all liability to be sued in the English Courts for any of his acts as King of Hanover but that, being a subject of the Queen, he was liable to be sued in her Courts in respect of any acts and transactions in which he might have been engaged as such subject. It is true that the decision went on the particular circumstance that the King of Hanover, after his accession to the throne, so far from renouncing his allegiance to the Crown or his subjection to the laws of England, had renewed his oath of allegiance and taken his seat in the English Legislature, and in the Privy Council. But the Master of the Rolls said "there are in Europe other Sovereign Princes who, if not now, have been, subjects of the country of their origin or adoption; upon such a question as this I cannot disregard those cases but they may have their specialities of which I am not aware. I cannot venture to say that a subject acquiring the character of a Sovereign Prince in another country and being recognized as a Sovereign Prince by the Sovereign of the country his origin may not by the act of recognition in ordinary circumstances, and by the laws of some countries, be altogether released from the allegiance and legal subjection which he previously owed."

It is evident that the Master of the Rolls strongly inclined to the opinion that, even without the peculiar circumstances of the case before him, the King of Hanover was liable to be sued in an English Court in respect of his acts and transactions as a subject; and that whatever were the laws of some other countries the laws of England do not release a subject who may acquire a sovereignty from his allegiance and subjection to them.

As to the second point. In the case already cited it was held that in a suit against a Sovereign Prince the Bill should, on the face of it, shew a case in which he is liable to be sued as a subject. Here it sufficiently appears by the Bill that the subject matter of this suit is of that description as it relates to a trading partnership originating with the Rajah, and which was intended to be, and was, carried on by the plaintiff in Prince of Wales' Island with a vessel of the Rajah having British colors. In Cremidi v. Powell, the Gerasimo (11 Moore's Privy Council cases), which was the case of a vessel seized by an English man-of-war during the Rusian war, the question was whether the owners of the cargo were to be considered alien enemies, and the judgment said .-- "If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country; if he does not avail himself of the opportunity he is to be treated for the purposes of the trade as a subject of the power under whose dominion he carries it on; upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided for the purposes of the trade by the national character of the place in which it is carried on."

For the purpose of the partnership transactions carried on by the plaintiff and the Rajah the same principle must apply. The trade was carried on in Prince of Wales Island, and for that purpose the national character of the Rajah must be that of an English subject.

Mr. Braddell for the defendant,

1st. The statement in the Bill that the Rajah was born in Penang is not sufficient to constitute the status of British subject, for there are several excep-

tions, such as birth in the house of an Ambassador, or in a part of the British territory occupied by an enemy: Calvin's case 7 Rep. 48a, and the Bill does not, as in the case of the King of Hanover v. Duke of Brunswick, charge, in express words, that the King was a subject of this realm. It was for the plaintiff to show that the defendant was subject to the jurisdiction, not for the defendant to shew that he was exempt, and the plea supplies what is necessary on the defendant's part, in stating, as it does expressly, that the Rajah is a Sovereign Prince: Duke of Brunswick v, King of Hanover, 5 Beav. 1.

[The Judge—The Bill states that the Rajah was born here and that he is an officer of the Siamese Government. Is not that enough to shew, prima facie that he is a subject of the Queen by virtue of his birth? If the defendant relies on the fact that his father was a Sovereign, should he not have pleaded it? It is a matter that should come properly from the defendant, not the plaintiff. In an action for goods sold and delivered, it is not necessary for the plaintiff to aver that defendant was not an infant or a married woman.]

2nd. Even if a British subject at the time of his birth, the Rajah is now a Sovereign Prince, and, as such, is exempt from the jurisdiction of any municipal Court,—the King of Hanover's case above cited; and, on the authority of the same case, it is contended that the plaintiff ought to have shewn on the Bill that the contract alleged was entered into within the British territory, and was of a character which excluded the supposition that it was entered into by the Rajah in his capacity of Sovereign, and there is nothing in the Bill to shew, in a part of the world where Sovereigns enter into trade for revenue purposes, that the contract alleged in the Bill was not an act of State.

3rd. In the King of Hanover's case the Master of the Rolls guarded himself carefully, throughout his judgment by restricting every position laid down of a foreign Sovereign born in England and owing allegiance to the British Crown being liable to the Courts in England for all acts done by him in his capacity of subject, to the case of such a Sovereign himself claiming his rights as a British subject, and actually residing in England in the exercise of such rights at the time of suit brought. Now the Rajah of Quedah, though born in Penang, was so born the son of a Sovereign Prince then in exile from his dominions, and received by the British Government as such exile, and afterwards restored to his throne in 1842, at which time the defendant was a mere child, and so far from acting as the King of Hanover did after his accession to the throne of Hanover, the Rajah of Quedah has always repudiated subjection to the British Crown, and has never come back to any part of the British dominions since he left Penang in 1842, except on short visits of a day or two on State business. Therefore this case is much stronger than the Duke of Brunswick v. the King of Hanover: and at the time of, or within a few months of, the Rajah's birth in Penang this Court, at Malacca, held that his grandfather was then a Sovereign Prince, and exempt from the jurisdiction of this Court. At that time the defendant's father was in attendance on his Sovereign, and the defendant having been born in exile was born in allegiance to his grandfather and not to the British Crown. There is strong authority for saying that the expulsion of a Sovereign from his territory does not take away the allegiance of his subjects; see 2 Howell's State Trials 570, 595, 692, and it is contended that, although the infant born in Penang owed allegiance in return for protection, this allegiance was only local and temporary and ceased on removal from the British dominions, for, by analogy in English law which makes the heirs to the Crown British born subjects, wherever they may be born, it is clear that in this case

the Rajah being born under the allegiance of his grandfather could owe no allegiance to the British Crown, any further and any longer than as a return for protection granted by that Crown, and when protection ceased allegiance ceased with it.

Lord Langdale, in the King of Hanover's case, says "I cannot venture to say that a subject acquiring the character of a Sovereign Prince in another country, and recognized as a Sovereign Prince by the Sovereign of the country of his origin, may not, by the act of recognition in ordinary cases and by the laws of some countries, be altogether released from the allegiance and legal subjection which he previously owed; but this case must depend on its own circumstances." It is contended that if any circumstances could warrant the conclusion, the present case does.

4th. The Bill states that the Rajah proposed a contract to the plaintiff and this contract was afterwards agreed upon by the Rajah. At the time of this alleged agreement the Rajah was certainly in Quedah, and to make him liable to the jurisdiction, under the authority of the King of Hanover's case, the Bill ought to have expressly charged that the contract was entered into and completed by the Rajah while he was in the British dominions in the exercise of his rights as a British subject.

5th The reasons on which the exemption of Sovereigns depend exist in this case, as—how could the process of the Court be served, how could this Court exercise any authority over a man who claims and exerts the right of sovereignty, and who is recognized by this Government as a Sovereign? War is the only remedy between States or Sovereigns for injuries when the Sovereign, even if a subject of the States, is sued for matters done by him out of the realm at a time when he is not, within the realm.

The following authorities-were also referred to by Mr. Braddell. Sir Harry Vane's case, 6 Howell's State Trials 119. Taylor and Barclay, 2 Sim. 213-Munden v. Duke of Brunswick 10 Q. B. 656. De Harber v. Queen of Portugal and Wordsworth v. Queen of Spain, 20 L. J. Q. B 488, Marten's Law of Nations, pp. 23. 101. 184. 231. Vattel's do. Chitty's edit. pp. 2, 93. 102. 106.

Judgment-The Bill in this case states that the plaintiff is a merchant carrying on business here; that the first defendant was born and has resided in the same settlement, but now resides in Quedah, a territory subordinate to Siam, and of which he is the Governor or Ruler under the appointment of the King of Siam, helding such office during his will and pleasure; and that the other defendant is a trader, a subject of Quedah, but now residing in Prince of Wale's Island. It then goes on to state that in January 1856, the first defendant, hereafter called the Rajah, was the owner of the British barque the Gratitude, but that he had purchased it in the name of Wan Ismail, who appeared as the legal owner; that the Rajah and the plaintiff, about that time, agreed that the plaintiff should take the entire management of the vessel, and employ her in trade wheresoever or howsoever, either on their joint account, or by charter or on freight, or in any other manner that the plaintiff should deem advisable; the plaintiff to make advances for the usual disbursements and expenses of the vessel and for the purchase of cargoes, which were, however, to be eventually borne by both parties equally, and they were also to share equally in profit or loss; the expenses of repairing the vessel and of providing her with rigging, tackle and other necessaries were to be advanced by the plaintiff, but to be borne by the Rajah exclusively. The Bill then states that Wan Ismail, by the direction of the

Rajah. executed a Power of Attornery, to comble the plaintiff to act in the man agement of the vessel and partnership; with regard to third parties; that the vessel made several voyages, that the account of the first was furnished to the Rajah himself but as to all subsequent accounts, copies of them were taken for the Rajah by Wan Ismail, who was empowered to act for him as his agent. Finally the Bill states that the barque was chartered by one Oong Achoon in April 1857 for a voyage to China, and was lost in the month of October in the same year, off the coast of Cochin China; that the vessel was so char tered before, and not, as the Bill alleges that the Rajah insists, after the Rajah had requested the plaintiff to return the vessel to him; that the sum for which the vessel was chartered was 6000 dollars, of which 3500 were to be paid only on her return to Penang; that the freight was insured in the plaintiff's name in the Calcutta Mercantile Marine Insurance Society who refused to pay, and who were being sued in Calcutta in consequence. The Bill concluded by alleging that, not taking into account the said sum of 3500 dollars, the result of the partnership transactions left the Rajah owing the plaintiff 2789. 09; it says that Wan Ismail claims some interest in the transactions; and it prays that an account may be taken in this Court of these dealings, and that the defendants may be decreed to pay what shall be found due to the plaintiff.

To this Bill the Rajah of Quedah has pleaded that before and at the time of the commencement of this suit, he was, and still is a Sovereign Prince, that is to say, the reigning Sovereign of the kingdom of Quedah, a State tributary to Siam; and that by reason of the premises, he ought not to be compelled to answer the Bill, or any suit in respect of the matters in question in any Court.

The question which I have to decide, on these pleadings, is, whether the Rajah of Quedah is amenable to the jurisdiction of this Court in this suit.

The fact of his being tributary to another Sovereign is not inconsistent with his own sovereignty, and is immaterial for the purposes of this suit. "Though the payment of tribute to a foreign power does in some degree diminish the dignity of tributary states, from its being a confession of their weakness, yet it suffers their sovereignty to subsist entire." *Vattel B. 2. c. 1. s. 7.

Since the full discussion which the question underwent in the case of the Duke of Brunswick v. The King of Hanover, 6 Beav. I, it cannot be doubted that, as a general rule, a Sovereign Prince cannot be sued in the Courts of a foreign country. To this rule there are exceptions, the chief of which is, that if a Sovereign sues in a foreign Court, he may be sued there in respect of the same subject matter. The reason of this exception is obvious: in appealing to a Court, he submits to its jurisdiction in respect of the subject in dispute, and he must abide by its principles and procedure in the same manner as an ordinary suitor. Lord Langdale, in his judgment in the case just cited mentions, as other exceptions to the rule, cases where a fund is to be distributed, in which a Sovereign may have an interest or where his agent is sued in respect of some matter in which the Sovereign is interested as principal,—in which cases he may be made a party to the suit; but these exceptions are perhaps more apparent

than real, for there it is not pretended to compel the foreign Sovereign to submit to the judgment of the Court. He is merely offered an opportunity of establishing his interests, or of defending them, when the suit is against his agent instead of leaving their defence to such agent. (6 Beav. 39.)

Another exception to the general rule is that which Lord Langdale laid down in the case already referred to, of the Duke of Brunswick v. the King of Hanover. In that case, the King of Hanover, a British subject, a Peer of the Realm and a Privy Councillor, returned to England after his accession to the Grown, took the oath of allegiance to Her present Majesty, and exercised the functions of a Peer and Privy Councillor. While still in England, he was sued by the Duke of Brunswick; and the Master of Rolls, while holding that, as a general rule, a foreign Sovereign is not amenable to the jurisdiction of our Courts, held also that the King of Hanover might be sued in them for acts in which he was engaged, not as a Sovereign, but as a private person. The plaintiff contended that this case governed the present. He also contended that the Rajah was not to be considered as a subject in this suit, on the authority of a passage in the judgment of the Privy Council in the case of the Gerasimo (11 Moo. P C. 88.) to theeffect that "the national character of a trader is to be decided, for the purposes of the trade, by the national character of the country inwhich it is carried on" But this, to dispose of the point at once has no bearing on the present subject. The passage in question refers to the case of a foreigner residing in a belligerent country, carrying on a trade there, and to the rule of Prize law in such a case that his property, (or so much of it, at least, as is connected with his establishment in that country), is subject to capture, as much as the property of natural born subjects. For this purpose, and to this extent, a belligerent has a right to treat all persons who reside in a hostile country; whatever their real national character, as enemies; but it is difficult to see what connection this rule can have with the present case, where there is no question whether the Rajah is friend or enemy. Analogies from the law of prize would not lead to the consequence desired by the plaintiff. If a war broke out between England and a foreign power the Rajah's property would be protected from capture, though he was a British subject, precisely because he was not domiciled here. See also such cases as the Osprey 1 Rob. 14 and the Herman 4 Rob. 228.

It was contended on behalf of the Rajah, that it did not appear upon the face of the Bill that he was a subject of the Queen,—the statement of his being born in Prince of Wales' Island not necessarily leading to the inference that this made him a subject in the ab-

sence of averments negativing that he was the son of a Sovereign, or of an Ambassador, or of an alien enemy in hostile possession of the country. Further, it was contended that even if the Rajah did not fall within any of these exceptions, it was not law that he was, by his birth in the Queen's dominious, a subject of the Queen. It was also said that there was nothing in the transactions which were the subject matter of the suit to establish that the Rajah had engaged in them as a private individual and not as a Sovereign; and that the presumption, according to Lord Laugdale, (6 Beav. 58), ought therefore to be that he had acted in the latter capacity.

As to the point of pleading, I intimated, in the course of the argument, that I thought the Bill sufficient, on the ground that the matter need not be stated which should come more properly from the other side; and the argument addressed against the Bill seemed to me to be more applicable to the plea. In the absence of averments asserting any of those matters which it was contended that the Bill ought to have negatived, I must take it that the Rajah was born of parents in a private station of life, and owing at least actual obedience to our Sovereign.

In this state of facts, I take it to be clear that the Rajah of Quedah was, at his birth, a subject of the Queen, according to our law In Calvin's case (7 Rep. 18 a) it is said that the incidents to a subject born are, that the parents be under the actual obedience of the King, and that the place of his birth be within the King's dominions. Actual obedience is enough, however momentary and uncertain it be, and if one under such obedience hath issue, that issue is a natural born subject. (Id. 6 a.) I am not aware that this has ever been doubted to be law; it is followed by all writers of authority, such as Blackstone and Stephen, and is even noticed as a well known rule of our law by Vattel (Bk 1. c. 19 §. 214.)

Whether the Rajah continued a subject after he became, and was recognised as the Sovereign of Quedah, is a different question, but one upon which it is unnecessary to offer any opinion, in the view which I have taken of this case. I shall assume that he did continue, and is now a subject of the Queen; and then the question is whether, being so, he is amenable to the jurisdiction in the present suit.

It is necessary to consider, here, what are the grounds of that general rule which establishes the immunity of Sovereigns, and what are the grounds of the exceptions to it. "The question," says Lord Langdale, "is to be determined by that which may be thought to be the law of nations applicable to the case; there is no English law applicable to the present subject, unless it can be derived from the

law of nations, which, when ascertained, is to be deemed part of the common law of England." (6 Beav. 45) "If we hold Sovereign Princes to be amenable to the Courts of this country, the orders and decrees which may be made cannot be executed by the ordinary Where is the power which can enforce obedience? If accidental circumstances should give the power, and if, for the supposed purposes of justice, an attempt were made to compel the obedience of a Sovereign Prince to any process, order, or judgment, he and the nation of which he is the head, and probably all other Princes and the nations of which they are the heads, would see, in the attempt; nothing but hostile aggression upon the inviolability which all claim as the requisite of their Sovereign and national independence It must be admitted, that the subject is replace with difficulties. These difficulties and the importance of maintaining the legal inviolability of Sovereign Princes, can scarcely be shewn more strongly, than by adverting to the opinions which have been expressed by eminent jurists, that offences committed by Sovereign Princes in foreign States ought rather to be treated as causes of war, than as violations of the law of the country where they are committed, and ought rather to be checked by vengeance, and making war on the offender, than by any attempt to obtain justice through lawful means." After citing the opinions of Zouch and Bynkershoek, he "When great and eminent lawyers, men of experience and reflection, so express themselves, as to shew their opinion, that less mischief would ensue from the unrestrained and irregular vengeance of individuals and of the multitude, than from attempts to bring Sovereign Princes to judgment in the ordinary Courts of a foreign country where they have offended, however much we may lament that such should be the condition of the world, we may be sure of the sense which they entertained of the difficulty of making, and of the danger of attempting to make, Sovereign Princes amenable to the Courts of justice of the country in which they happen to be After giving to the subject the best consideration in my power, it apnearing to me that suits against Sovereign Princes of foreign countries must, in all ordinary cases in which orders or declarations of right may be made, end in requests for justice, which might be made without any suit at all; that even the failure of justice, in some particular cases, would be less prejudicial than attempts to obtain it by violating immunities though necessary to the independence of Princes and nations, I think that, on the whole, it ought to be considered as a general rule, in accordance with the law of nations, that a Sovereign Prince, resident in the dominions of another, is exempt from the jurisdiction of the Courts there," 6 Bear, pp. 48-51.

From the passages just quoted it appears that the rule is founded on this general consideration, that to require a foreign Sovereign to submit to the authority of our Courts would be a violation of immunities necessary to his independence and a hostile aggression on his inviolability. This would be a legitimate ground of offence to him and to all other Princes, and might lead to war; and in the choice of evils, it is better that there should be a failure of justice to an individual, than that the State should be involved in danger. appears to me that all the exceptions to the rule turn on the existence of peculiar circumstances which preclude the giving of legitimate offence and the consequent danger. Thus, the Sovereign who appeals to a foreign tribunal cannot complain that his Sovereign rights are infringed by his being required to answer a cross Bill, or a Bill of discovery, concerning the same subject matter. So, those rights are not invaded when he is made a party to a suit merely for the purpo se of giving him the option of defending his interests already imperilled through his agent.

And, as it seems to me, it was upon analogous grounds that Lord

Langdale held that the King of Hanover might be sued. came here," he says, "as King of Hanover only, the same inviolability and privileges which are deemed to belong to all Sovereign Princes would have been his, save in peculiar cases, such as I have referred to" (viz. of a Sovereign who sues being required to answer a cross Bill &c.) "he would have been exempt from all process. ing here not as King of Hanover only, but as a subject, as a peer of the realm, and as a member of Her Majesty's Privy Council, can it be reasonably said that he is exempt from all jurisdiction, or in other words, from all responsibility for his conduct in any of those characters.... Can any Peer or Privy Councillor, whatever station he may occupy elsewhere, be permitted to give advice, for which any other peer or any other member of the Privy Council might be justly impeached, and yet hold himself exempt from the jurisdiction of the highest tribunal in the realm"? p. 55. "Great inconvenience," he goes on to say, " may arise from the exercise of any jurisdiction in such a case. They arise, perhaps, from the two characters which his Majesty the King of Hanover unites in his own person, and from the claim which he voluntarily makes, to enjoy or exercise, concurrently, in this country, his rights as an English subject, peer and Privy Councillor Remaining in his own dominions, or in the

dominions of another Prince of whom he is not a subject, he would, as I presume be exempt from all forensic jurisdiction. But he comes to this country where he is a subject, and claims and exercises his rights as such' (pp. 55, 56). "Admitting it to be the general rule,

that Sovering Princes are not liable to be sued, and that all Sovereign Princes may consider themselves interested to maintain the inviolability which each one claims, and that any aggression upon it might in ordinary circumstances, be a cause of war; yet, observing what is stated to be the law of nations in the case of Ambassadors, conceiving that a rule applicable only to the case of Sovereigns who are subjects. and think fit actively to exercise their rights as subjects, cannot have any extensive application and is not likely to excite any general interest, or any alarm, and having regard to that which is absolutely required to maintain the relation of Sovereign and subject in any country. I am of opinion that no complaint can justly or will probably arise, from any legal proceeding, the object of which is to compel, as far as practically may be, a Sovereign Prince residing in the territory of another Prince whose subject he is, to perform the duties of a subject, in relation to his own acts done in the character of subject only I do not think that I ought to presume that a Sovereign Prince, who deems it to be consistent with his dignity and interest to come here and practically exercise the rights of an English subject, will not also deem it consistent with his dignity and interest to yield willing obedience to the law of England when duly declared." p. 57. In short, the defendant was Duke of Cumberland as well as King of Hanover, and it was because he had, while residing in England, by acts of the most unequivocal kind, which could not be referred to his Sovereign character, insisted on his rights and privileges of a subject, that the Master of the Rolls thought that he might consider him to have precluded himself from objecting to his being treated, in respect of private and personal transactions, as a private person.

In these respects the present case differs altogether from the case of the King of Hanover, Lord Langdale confined himself to "the case of Sovereigns who are subjects, and think fit actively to exercise their rights as subjects". (6. Beav. 56.) The Rajah has not exercised any such rights in entering into the mercantile adventure which is the subject of this suit. Lord Langdale confined himself to the case of a foreign Sovereign residing within the British dominions. The Rajah is domiciled in his own territories. In all the facts, then, which influenced Lord Langdale's decision, the cases differ wholly; and the whole train of reasoning in the King of Hanover's case is inapplicable to the present. It does not fall within any of the other established exceptions to the general rule, nor is it governed by any principle analogous to that on which those exceptions depend.

The question, then, is, whether a foreign Sovereign residing in his own dominous is subject to the jurisdiction of our Courts, merely

because he happens to be a subject of our country, by virtue of our peculiar law. There is no authority in support of such a proposition, and I think it cannot be supported on principle. Lord Langdale says, in one of the passages already cited, that the King of Hanover would have been exempt from all foreign jurisdiction if he had remained in his own kingdom; and in another, that even in England he would have been entitled to the inviolability belonging to all Sovereigns if he had come as King of Hanover only. The former dictum may have had reference to the state of our law at the time when Lord Langdale spoke, which did not enable our Courts, except in certain classes of Chancery suits, to reach parties abroad; and the latter may also be possibly susceptible of explanation; but it seems to me that both are correct in the sense applicable to the present subject. Without going the length of asserting that a subject, on becoming and being recognised as a Sovereign, is, for all purposes and under all circumstances whatsoever, released from his allegiance, I think that the recognition must be taken as amounting to at least an admission that he is entitled to exercise, in full independence, all those Sovereign rights and powers of the nation of which he is the recognised organ. If so, "the danger of attempting to make Sovereign Princes amenable to the jurisdiction of the country in which they happen to be," which is the ground of their immunity from suit, exists in his case as much as in that of other And if a Sovereign may legitimately treat attempts of the Courts of the foreign country in which he is residing, to enforce his obedience to their authority, as a hostile aggression on his inviolability, it seems to me that he has still stronger grounds for so treating such attempts, when made while he is residing not merely beyond the natural limits of their jurisdiction, (the limits of their own territory,) but in his own dominons.

But there is yet another important fact in this case, to which I must advert. The character of subject not only is not insisted upon by the Rajah, but it is not acccepted by him. It is, as it were, thrust upon him by our own peculiar municipal law; and I think that this is a material circumstance in the decision of a question which as Lord Langdale says, "is to be determined by that which may be thought to be the law of nations applicable to the case." Differing from that which is, I apprehend, the general rule in other countries, that the citizens of a State are those who are born, no matter where, of parents who are its citizens, our law declares every man a subject who is born within our dominions. But it seems to me that the dangers adverted to by Lord Langdale might be very justly apprehended, if it were to be held that a nation which, by virtue of a

peculiar law, claims a foreign Sovereign for its subject, can justly enforce against him, even when domiciled in his own dominions, all the logical consequences of his filling that character, though he does not claim the character, and the law of his own country and the ordinary understanding and custom of mankind do not impose it on him. If this were so, the son and the grandson of the Rejah would be equally amenable to our Courts, because the Acts of 4 Geo. 2, & 13 Geo. 3, naturalise the sons and grandsons of natural born subjects; and the descendants of the King of Hanover, to the latest posterity, would be so amenable, because the Act of Settlement declares all the descendants of the Princess Sophia natural born subjects. I am not prepared to adopt a proposition from which such consequences might follow.

Upon the whole; after giving the question my best consideration, I think that the Rajah of Quedah is not bound to answer the plaintiff's Bill. As a Sovereign he is exempt from the jurisdiction of foreign Courts; the facts of the case do not bring him within any of the established exceptions to that general rule; and I am unable to discover any adequate reason in principle, for excepting him for it. The plea will therefore be allowed, and the Bill dismissed as against the Rajah.

Mr. Nairne applied for leave to reply that the Rajah of Quedah was not a Sovereign Prince, as alleged in the plea.

THE RECORDER said that this would be merely to put in issue a fact of which he was bound to take judicial notice. It was his duty to know whether the Rajah was a Sovereign Prince or not, and his judgment assumed that he was. He had never doubted that the Rajah was so recognised by our Government. It was a matter of notoriety that 10,000 dollars were paid yearly to him under a Treaty made last century, by which the East India Company agreed to pay that sum yearly to the Rajah of Quedah.

Mr. Braddell again referred to the case decided at Malacca by Sir. Benjamin Malkin, where the late Rajah pleaded a similar plea to the present, and the plea was allowed.

Mr. Nairne said that the Treaty negotiated by Capt. Burney in 1826 between the East India Company and Siam, spoke of the Rajah as "the late Governor" of Quedah, and similar lauguage was used in the recent Treaty concluded by Sir. J. Bowring with the same power. Col. Butterworth had, when Governor, not many years since, sent a letter so addressed, to the Rajah.

THE RECORDER said that those circumstances were by no means conclusive. If the Government recognised a Sovereign in their dealing with him, their being parties to an instrument with another

power in which he was described differently and to which he was no party, was immaterial. The question was, what was the Rajah's position at the date of his plea; and if the plaintiff really questioned his character as a Sovereign, he (the Recorder) should make inquiry of the Local Authorities on the subject. If he had been mistaken, his judgment would, of course, fall to the ground, and he should overrule the plea, taking judicial notice that the avertment that the Rajah was a Sovereign Prince, was not true.

March 25 .- This morning, the RECORDER in Chambers, desired the Registrar to inform the parties that the Resident Councillor, having but lately assumed his office, was not prepared to inform him authoritatively whether the Rajah of Quedah was recognised by our Government. But he (the Recorder) had found on referring to a correspondence which had passed between the late Governor and himself, two years ago, that that gentleman described the Rajah as an "independent native chief," not only in writing to him (the Recorder) but in addressing the Supreme Governeut. He could not hesitate to accept Mr. Blundell's assertion on such a point, agreeing; as it did, with what he had always understood to be the fact. word "independent," was obviously convertible with "Sovereign;" and having learned from the Resident Councillor that no change had occurred in the Rajah's position since the date of Mr. Blundell's letter, he was satisfied that he had been right in considering the Rajah a Sovereign Prince. His judgment would therefore stand, and the Bill be dismissed as against the Rajah.

> Before The Hon'ble Sir P. B. Maxwell, Recorder. Oh Wee Kee versus Kuppen Tomby.

In an action to recover a penalty on an agreement for a breach of it, the plaintiff is entitled to recover the damages actually sustained, if the amount sued for is of the nature of a penalty and not of liquidated damages. The damages in such case will not exceed the penalty named in the agreement.

Penang Gazette 28th December 1861. JUDGMENT

This was an action brought to recover \$200 penalty for breach of a covenant. The plaintiff by an agreement under seal dated the 8th of December last, agreed to supply the defendant, who is a dubash, with all the fresh beef and white bread he, the defendant, should require during the next ten months for the use of all the vessels in the harbour that should take their supplies of such articles from him, at the rate of five cents a pound for the beef and four cents a loaf for the bread. On his part, the defendant covenanted not to buy the above articles from any other butcher or baker, under

a penalty of \$200. The plaintiff bound himself in a like penalty for any breach of the agreement on his part. The declaration set out the agreement and averred as a breach that the defendant had at divers times between the 2nd of August and the 3rd of September. bought white bread and meat elsewhere for vessels. The defendant pleaded, among other pleas, by way of an equitable plea, that the bread supplied by the plaintiff on certain days was not fit for food, and that the plaintiff had been guilty of a breach of covenant in refusing to supply the defendant with some beef that he required. At the trial the plaintiff proved that during the whole of August last two of the defendant's agents purchased bread for vessels in the harbour from another bakery. It appeared that another of the defendant's agents during the same time, continued to take bread from the plaintiff. One of the agents who had ceased to take bread, swore that the bread supplied to him was of an inferior quality, full of sand, and had been rejected by the captain of a ship on that account. He also said that he had twice remonstrated with the plain -. tiff; the other said that he went to the other shop because his comrade told him that the plaintiff's bread was not good. The plaintiff denied that any complaint had ever been made to him about the quality of his white bread, but he admitted that a complaint had been made to him by the first witness respecting the quality of some brown bread taken by him, which he said was not properly risen. the refusal to supply meat, it was proved that one of the defendant's men on one occasion asked that three of the fifteen pounds of beef which he required should be steak, and that the plaintiff refused to give him steak, except at an enhanced rate.

The learned Recorder, in giving judgment, said that he had taken time to consider whether the plaintiff was entitled to recover the penalty for which he sued, or whether was only entitled to the damages actually sustained. There was no doubt that if the case were not affected by Statute and decisions, the plaintiff would be entitled to the whole amount claimed according to the intention of the parties as gathered from their expressions. The Courts of Equity, however, prior to the passing of the Statute of William 3rd, had been in the habit of relieving persons from the penalties to which they bound themselves and which were recoverable against them at common law. The penalty was regarded as merely a security for the damages actually sustained, and these alone were suffered to be recovered, Act of William III empowered the Common Law Courts to deal with cases of this nature in the same manner as the Equity Courts. It was very true that in Sainter v. Fergusson, 7 C. B. Rep. 716, and in Galsworth v. Strutt, 1 Exch. 659, the amount named as a penalty

was held to be recoverable. But in these cases, the sum named as a penalty was, in fact, liquidated damages. It would have been impossible for a Court of Equity to determine in these cases what was the damage actually sustained by the plaintiffs in consequence of the defendants practising their professions in certain places contrary to their. If the defendants had gone to an Equity Court, they would have had no relief. In Sainter v. Fergusson the agreement was that in consideration that the plaintiff, a surgeon and apothecary of Macclesfield, should engage the defendant, as assistant to him as a surgeon, the defendant promised the plaintiff not to practice, at any time, as surgeon or apothecary at Macclesfield, or within seven miles thereof, under a penalty of £ 500. And the plaintiff agreed with the defendant to engage him as an assistant surgeon on these terms, Now if the £ 500 in this case, was not recoverable, what sum would How could a jury ascertain axactly the damages the plaintiff sustained by the defendant practising as a surgeon? The exact amount of loss was not susceptible of proof and the only reasonable course was to give the defendant the sum agreed upon as the penalty.

In the present case it had been agreed that the defendant should take from the plaintiff all the white bread and beef he required to sell to the ships in the harbour which he supplied with provisions; therefore if the defendant had bought a single loaf elsewhere during the ten months he would have been liable to the penalty. case occurred before the passing of the Statute and had the penalty been adjudged by a Common Law Court, the Courts of Equity, if the defendant had applied to them, would have assessed the damages at the loss the plaintiff sustained on the single loaf of bread, and since the Statute the Courts of law did the same. In Betts r. Birch, 28 L. J. Ex. 207; the subject was elaborately reviewed by Mr. Baron Bramwell; and entirely concurring with that learned judge and Mr. Baron Martin that if the matter were res int grathe penalty ought to be recoverable, he, the Recorder, felt, like them, bound by a long arrayof authorities from Astley v. Weldon and Kemble v. Farren down to Betts v. Birch to hold that the plaintiff could recover only the amount of the loss which he had actually sustained.

With respect to the Equitable plea, it was unnecessary to decide whether it was good or bad in law, because he was of opinion that it had not been proved. He was satisfied from the evidence that the bread was good and that the defendant's agents had no excuse for not taking it from the plaintiff. As to the plaintiff's refusal to supply steaks, it was contended on his behalf that "fresh beef" in the agreement meant the coarser parts of beef which were ordinarily sup-

plied to seamen, and did not include the finer parts. This construction was disputed by the defendants who insisted on the plain and ordinary signification of the words. Into this question also, it was unnecessary to enter; for it was plain that a refusal by the plaintiff to sell steak in September was no answer to an action against the defendant for having bought his bread elsewhere in August; nor could the damages of the defendant betset off against those of the plaintiff. The plea therefore failed altogether. He had therefore only to assess the damages sustained by the plaintiff during the month of August by the defendant's two agents buying bread from another baker. And considering it proved that each of these men purchased 3 loaves a day during that month and that the plaintiff made a profit of 2 cents upon each, the loss actually sustained by the plaintiff, was therefore \$3.60 and there would be judgment for him for that amount.

Nonya Siu vs. Oothmansah Merican.

Snbsequent Marriage by Chinese females in this Colony, after divorce, valid. The law of China and the local custom as to guardain for Marriage (Wallee as it is termed in Mahomedan law), considered.

Penang Gazette, 1st February 1862

JUDGMENT OF SIR P. BENSON MAXWELL, KNT. RECORDER.

Nonya Siu was married to Lim Bun, left him, and lived afterwards with Hui Siau till his death. In 1845 a deed was executed by her and Hui Siau conveying certain lands and tenements to the defendant, and the chief question in this cause was whether the conveyance was binding on her, as being a married woman at the time when it The marriage to Lim Bun was admitted; but it was asserted on the plaintiff's part and denied on the defendant's, that she had been divorced by her first husband and married to Hui Sian. The plaintiff alleged that she had been divorced by mutual consent, according to Chinese law; that the cause of quarrel between herself and her husband which led to the divorce, was, that he complained of her indolence; that after the divorce she lived for a year with her sister Nonya Lian; and that at the end of that time she married Hui Siau. On the defendant's part evidence was adduced to shew that the cause of quarrel was that the plaintiff had been detected carrying on an intrigue with Hui Siau, and that while she stayed at her sister's. Hui Siau lived with her, and after a time both took up their abode in the town, and afterwards in Batu Uban. Evidence was also given on both sides as to reputation, some of the witnesses alleging that the two passed as man and wife, while others had always understood that the plaintiff lived with Hui Siau as his mistress

(ikot sama dia). Chinese witnesses were examined on the subject of the Chinese law; but the evidence shewed that their information was of the slightest character. Some of them went even so far as to deny that a divorced woman could marry again. It is unnecessary, however, to refer further to the evidence, as the Recorder relied solely on Staunton's translation of the Chinese Penal Code.

The case was heard at the last December sittings, and the Recorder took time to consider his judgment. On a subsequent day the learned Judge, in delivering judgment, said that he considered that the divorce had been clearly established. The question was whether the alleged second marriage had taken place. The Chinese law permitted a woman to marry a second time, unless she had received an honorary title from the Emperor during her first husband's life (Staunton's Penal Code p. 112.) But to render the second union a marriage, there must be a person to give the woman away to the new husband and a delivery of marriage presents, otherwise it was considered simply as a case of concubinage. (Ib. p. 113). If this rule were in force here, it was plain that the marriage set up could not be sustained, for the plaintiff admitted that neither her uncle. the head of the family; nor any one else, gave her away. But the rule could not be held essential here under English law, where a very different degree of liberty and respect was accorded to women than in China or other part of the East. In China a woman appeared to be, as in India, in a state of perpetual tutelage, and to be either under a general incapacity to contract, or to have no right to dispose of her person as she pleased. The necessity of giving away was not so much a part of the ceremony as a consequence of the general law relating to the status of the woman. But here this must be determined by English, and not by Chinese law. It must be taken, therefore, that the uncle's not giving her away did not make the cercmony a nullity, if in other respects it was a a valid marriage.

The question however, remained, had the plaintiff ever been married to Hui Siau; and on this point the evidence was conflicting. The plaintiff said that several persons were present at the marriage; Nonya Engku, Nonya Luan, her sister Chiah Lian, Chau Su Phan and Chiah Hin. The two latter were dead. Lian denied that she was present. Engku was not called. Tian Tek, who was said to have been at the feast, denied that he was. The only persons who gave any evidence in the affirmative were the wife of an actor who said that she was sent for the bride, a man who said he carried trays to her house with candles, pigs-feet and fowl in the morning, and assisted in laying the table for the feast in the afternoon, and one

of the guests who said that he was at the feast. It was not improbable that there was a feast at some time; but though that might be some evidence of a marriage having taken place, it did not constitute a marriage. On the other hand, Nunva Lian positively denied that she was present. The plaintiff admitted that Nonva Sin, another sister, was not there; her half sister Nonya Eh Long was also absent; so that the evidence before the Court failed to shew that' any of her relations were present. Again, though he was of opinion that it was not essential to the marriage that the woman should have been given away by her uncle, yet the fact of her not having been so given away, according to the usage of her country, had a very material bearing on the question whether there had been any marriage de facto. The Chinese were more than any other people attached to their usages, and the admitted absence of the uncle therefore threw great doubt on the question. Besides, looking to all the circumstances, was it likely that there was a marriage? From the evidence, though conflicting, he had no doubt that there was colabitation before the marriage. The divorce paper did not mention the adultery, but it was natural that it should not. But it was more probable that this was the real cause of the divorce than the indolence of the wife, or her temper, as she alleged, especially as several witnesses had spoken to the fact of the adultery. If there had been a marriage, one would have expected that the family would have taken care that it took place as publicly as possible and with full ceremonies. The whole object of it would have been that the woman's position in life should be rehabilitated, and that the marriage should throw a veil over her previous misconduct. This assumed. indeed, that the woman and her friends were sensitive on the subject of marriage or no marriage. But it appeared clearly in this case—as it had appeared in every other case in which the subject had been mentioned in Court-that the Chinese (of this place at all events) visited with no social ban or degradation, women living in a state of concubinage. Their wives visited them and associated with them on terms of equality. They were addressed as wives, (bini). There appeared to be no inferiority in their social status. What object then could there have been for a marriage, after living for a year with the man, as the plaintiff would appear to have done? None apparently, and coupling this with the important fact that the woman had not been given away by her nearest male relative, with the absence of all publicity, and with the fact that no witnesses had spoken to the marriage but the actor's wife and the man who carried the tray with fowls &c., while of all others said to have been present some denied it, and some were not called, he (the Recorder) must come to the conclusion that there was no marriage.

12th March 1862.

Refore the Hon. Sir P. BENSON MAXWELL, Recorder.

Coopan Chetty & another vs. Bain

A suit for specific performance of an agreement by a Principal, must be brought against him and not against the Agent who made the promise, or at all events he must be made a party to the suit because his interest is above affected.

SEMBLE.—An agreement to be binding on the Principal must be in writing. SEMBLE.—If in such a case the Agent is only made Defendant, a demurrer lies to the bill.

QUERY.—Can an agreement to execute a Policy of Insurance on a ship be enforced if the vessel is not seaworthy?

QUERY.—Is it too late in such a case to pray for specific performance after notice of ship being lost?

The Bill set forth that the defendant, as the Agent of the Netherlands India Sea Insurance Company, on August 20, 1861, contracted to grant the plaintiff's Policy upon certain goods which they intented to ship on board of the "Alert", a vessel then lying in the harbour for conveyance to Nagore. The plaintiffs on the faith of this contract shipped Betelnut on board of the "Alert" to the value of \$ 4.000, and on the 26th got from the Captain and handed to the defendant, the bills of lading. Two or three days after the ship had sailed the plaintiffs applied to the defendant for the Policy but he refused to grant it unless compelled by the decree of the Court on the ground that the ship was unseaworthy at the time she sailed. The plaintiffs averred that the ship was seaworthy, and that the defendant's surveyor had reported her to be so; but whether she were so or not, they were entitled to the Policy; and they prayed that the defendant might be compelled to issue it upon the plaintiffs paying the pre-The defendant in his answer admitted that he had promised to issue the Policy, but he denied having any knowledge whether the plaintiffs had shipped goods on board the vessel on the faith of such promise. He received the bills of lading on the 27th August and would have issued a Policy in accordance with the usual practise of his office if he had not discovered that the ship was unseaworthy when she sailed. He denied that he had caused the vessel to be surveyed. He had received a note from Captain Shepherd, the surveyor for his Company, as well as for the other Insurance Companies in Penang and for Lloyds, stating that, if defendant wanted to take any risks by the Alert he had seen a bad plank in her bow under the copper replaced with a good teak plank and six sheets of copper taken of the same side to have the vessel caulked underneath them; and that she was then as good a risk as she was when he had reported on her in May last. The report furnished in May last by Captain Shepherd stated that he had carefully examined the Alert- and considered her fit to carry a dry and perishable cargo to any part of India. It was this note that induced the defendant to believe that the vessel was seaworthy, and to agree to issue a Policy to the plaintiffs but without waiving the implied warranty by the insured, that the ship was sea-worthy. She obtained her Port Clearance on the 27th, and on the 28th he was informed by the Agent of one of the other Insurance Offices that she was reported to be leaking heavily and that some of the shippers had gone to the Master Attendant to stop her Port Clearance on the ground that she was unseaworthy. The defendant thereupon sent off to the Master of the ship, a letter signed by himself and the other Agents of

the Insurance Offices here informing him of the report, protesting against his sailing, calling upon him to have the vessel surveyed, and giving him notice that they would hold him responsible for any loss or claims that might arise in consequence of the ship sailing in the state she was in. No answer was returned to this letter and the ship immediately set sail, but she came to anchor near Pulo Tikus about 4 miles from the anchorage. The defendant was not informed of this and only discovered it after she had sailed away from the island. The defendant then informed the plaintiffs that he would not issue Policies. On the 4th of September the defendant sent written notices to the plaintiff and other shippers that he was compelled to refuse to issue Policies on account of the ship having left this port in an unseaworthy state, and he tendered back their bills of lading. As a number of shippers had applied for Policies the defendant early in September, on receiving formal demands for Policies; offered to the plaintiffs' to make certain admissions and waive certain objections, provided an action was commenced immediately in the name of one of the shippers and that the judgment in that case should bind the others. An arrangement to this effect was made between the shippers and the defendant but none of the former acted on it by taking legal proceedings, and the present suit was not commenced until after the news of the loss of the "Alert" had arrived in Penang instead of proceeding direct to Nagore she put in at Madras and was afterwards ran on shore near Cuddalore, without being compelled thereto by stress of weather.

The cause was tried on the 4th, 5th and 6th of this month. The Recorder deferred giving judgment till to-day. It is unnecessary to give any detailed report of the circumstances of the case as they came out in evidence, because they are not material to the question decided.

JUDGMENT: - The petition in this case prays that the defendant may be compelled, in pursuance of his promise, to execute a Policy of Assurance on certain goods of the plaintiffs, shipped last August on board a vessel called the Alert; and the defence set up in answer is, that the Alert was not seaworthy when she sailed. This was the only question of fact in contest between the parties at the trial, last week, and many witnesses were examined on both sides upon it. Upon the opening of the plaintiffs' case, however, I expressed a doubt whether the suit could be maintained, and it seems to me, after further consideration that it cannot. The Bill represents that the defendant acted throughout as the Agent of the Netherlands India Sea Assurance Company; that it was in that capacity that he was applied to, and in that capacity that he agreed to insure the goods. It is not alleged or suggested that he intended to incur, or that he was considered by the plaintiffs as in any manner incurring, any personal responsibility in respect of the assurance. It is in his capacity of Agent of the Company, also, and in that capacity alone, that he is now called upon to execute the Policy, i. e. to make a promise in the name of, and to bind, the Com-The promise or agreement sued upon, then, is the promise or agreement not of Mr. Bain, but of the Company, made through the instrumentality of their agent or servant; and the allegation in the Bill that he agreed as Agent; is in legal effect an allegation that it was the Company that made the promise. It is therefore for them and not for him to perform it. Either it is binding on them If it is, they and they alone are suable upon it. If it is not, I do not know on what principle the Court could now require their Agent to enter into an engagement in their name to give it that effect. It was said by the plaintiffs' counsel that the reason, or the chief reason, why the suit was instituted against the Agent, was, that the Insurance Company was not within the

jurisdiction of the Court. There is no averment to that effect in the Bill, but if the fact be so, it cannot affect their rights, or justify a decree against them (or such would be the decree here asked) in a suit to which they are not parties. If they are out of the jurisdiction of the Court, the plaintiffs may be compelled to have recourse to those tribunals within whose jurisdiction they are, though it is perhaps to be regretted for their own sakes as well as for the sake of those dealing with them, that they are not amenable to the Courts of the various places where they carry on their business by Agents, at all events in respect of causes of action arising against them in those places. It may be said, however, and I think that the plaintiffs' case was virtually put in this way, that the agreement sued upon is not binding on the Company because not in the requisite form-in other words that it is merely a verbal contract by their Agent that they would grant a Policy, that is, a promise to make a promise in their name, and that the Agent ought now to be compelled to perform the promise, by making a promise for the Company in the form binding upon it. If such a suit could be sustained, the Company would still be necessary parties to it, for their interests alone would be affected by it. But no such suit could, in my opinion be maintained. It would be a suit not to perform a contract, but to enter into one. It would be like a suit to compel a person who had verbally agreed to buy or sell land, to execute a contract in writing to satisfy the Statute of Frauds; or, to choose an illustration more nearly analogous to the present case, it would be like a suit against an officer of a Corporation to put the common seal of the Corporation to a contract negotiated on their behalf by one of the members of the body. If the agreement to grant a Policy is not binding on the Company, it is because, like in the cases just put, it is not a complete agreement, but what would have been called in the old Roman law a pactum without an obligation, a nudum pactum in the ancient though not in our sense of the term. But it is not necessary to consider whether the verbal agreement is binding on the defendant's Company or not. It is enough to say that if it is, it is against the Company and not against the Agent that it must be enforced; and if it is not, it cannot be enforced against them, and the decree prayed for cannot be made-For these reasons I think that the Bill must be dismissed, and it is unnecessary, therefore, to go into the question of seaworthiness which was in controversy at the trial, or the other question which was also raised, that the suit was too late as it had not been begun until after the news arrived that the Alert had been lost on the Coromandel Coast.

On the question of costs, I have had some doubt, because much expense would have been saved to both parties if the Bill had been demurred to * At the same time the defendant was not bound to take this course, and it was but proper that he should desire to meet his opponent on the substantial merits of the case. Upon the whole, I think that the general costs of the suit should be paid by the plaintiffs, but that the costs of the defendant's witnesses upon the question of seaworthiness should be borne by himself, that question being really immaterial in the suit.

^{*} The defendant was precluded from demurring by his promise to the plainiffs and the other shippers that he would waive all formal objections to the suit, in order to obtain the decision of the Court on the question of seaworthiness.

April 13, 1862.
Before the Hon. Sir. P. Benson Maxwell, Recorder.
Knus v. Hogan.

ACourt of Law will not imply a contract to contribute between two persons (tortfeasors) who are ordered to pay a sum of money by either a Court of Law or Equity.

SEMBLE: -But a Court of Equity would, as contribution does not, in equity, depend upon contract, but is founded on general principles of natural justice.

THE RECORDER: -This case was argued some time ago before me. tion was for money paid by the plaintiff for the defendant at his request, in the usual form of the money count; and the facts were these :- A Bill had been filed against both the plaintiff and the defendant for an injunction to restrain the negotiation of a promissory note which had been obtained by the present defendant from the plaintiffs in equity, and delivered by him to the present plaintiff. The injunction was granted, and the decree directed that the costs of the plaintiffs should be paid by the defendants. The whole of the costs were paid by the present plaintiff, and he now claimed from his co-defendant in the equity suit his proportional part of the amount. The defendant resisted the claim on the ground that there was no right to contribution between wrongdoers. This is clearly the rule at Common Law: and the reason of it is that at Common Law the right to contribution is based altogether upon contract, and that the contract, to contribute, like all other contracts, is, subject to the general maxim that ex turpi causă non oritur actio. Thus, if one of two joint debtors pays the debt due by them, the law implies a promise by the other to refund his proportion of the debt; but if the liability arises from a wrong done. as for the example from a trespass, the cause of action being in consideration of law turpis, no express contract to contribute could be supported, and a fortiori no such contract can be implied. No action, therefore, for the breach of any such contract could be maintained. This has been well settled law ever since Merryweather v. Nixon 8 T. R. 186, where the point was hardly so much discussed as taken for granted! The circumstances out of which the equity suit against the parties to this action had arisen, did not, indeed, constitute the defendants wrong doers at law; but if all civil actions and suits are to be classed as ex contractu or ex delicto, it cannot be doubted that that suit fell within the latter class. If this were not so, however, it would still seem that no implied contract could be implied between the plaintiff and the defendant from the circumstances which led to the equity suit. Lord Tenterden observed in Carpenter v. Thorinton 3 B. and A. 16, that he could not say that a man compelled by a Court of Equity against his will to pay a sum of money, impliedly agrees to pay that money; and it would be difficult to say that at Common Law a contract to contribute could between two persons ordered to pay a sum by such a Court. At law, therefore, I think that the argument of the defendant's advocate was conclusive, and that the plaintiff could not recover but in equity the right to contribution rests on different grounds. In the leading case on the subject, Dering v. The Earl of Winchelsea 2 Bos. and P. 270 and 1 Tudor's Leading Ca. in Eq. Chief Baron Eyre says that the right to contribution does not, in equity, depend upon contract, is founded on general principles of natural justice. And this difference in principle leads to important differences in practice. Thus, to mention one of the most familiar instances, where three persons are sureties and one of them is compelled to pay the whole debt, and another is insolvent, the surety who pays is entitled in equity to recover from the other solvent surety one

half of the debt, because it is considered consonant with natural justice that the whole burthen should be borne equally by the solvent sureties; which at law he can recover only one third from his solvent co-surety, because the only contract implied by law among the sureties is that each will contribute - third of the debt, if their principal fails to pay. If, then, the right to contribution is not founded on any presumed contract, the maxim which prevents the recovery of contribution at law is without effect on a similar claim in equity. only question then is, whether in justice and good conscience the contribution should or should not be made; and in this point of view, it seems to me that where two persons have been ordered by a Court to pay a sum of money to a third, which in this case, the one of the two who pays the whole, ought to be entitled to call upon the other to pay his share. The person in whose favor the decree is made may of course enforce it against either or both, as he pleases; but if the Court refused afterwards to adjust the burden equally as between them, it would not be doing, but refusing to do justice between them. And this is the rule at Common Law; justice is refused to wrongd-ders and the whole burden is suffered to rest on those on whom it has fallen in the first instance in equity. But in equity a different rule prevails; no difference appears to be made between contract and tort in questions of contribution In Lingard v. Bromley 1 V. & B. 114, contribution was enforced between the assignees of a bankrupt to reimburse a payment made by one of them under an order against all to pay for a loss occasioned to the estate by their refusal to join in a conveyance of premises which had been put up for sale by the Commissioners of Bankrupt. It is true Sir W. Grant M. R. there said that the liability of the assignees was not ex delicto unless every refusal to comply with a legal obligation makes a party guilty of a delictum; but it is now hardly a subject of doubt that a refusal to comply with a legal obligation is at law a tort for which an action on the case is the appropriate remedy; Barnett v. Lynch 5 B. & C. 609. In Robinson v. Evans reported in the 7th Vol. of the jurist 738, the defendants were sued by the executors of their co-trustee for contribution in respect of a breach of trust committed by all, and the liability of the defendants to reimburse the plaintiffs does not appear to have been even disputed. The marginal note of the case in Ireland cited by Mr. Aitken from Chitty's Equity Index (a) is wide enough in its terms to embrace the present case; and though it does not appear in that note what was the nature of the suit, I think, having regard to the authorities just mentioned, that the rule there laid down was not intended to be confined to cases ex contractu, but that it is equally applicable to such a case as the present. As this action, then, rests the claim for contribution on implied contract it seems to me that it caunot be maintained. I cannot decide that the money was paid by the plaintiff at the defendant's request express or implied, and from such request a promise to repay arose. At the same time I am of opinion that if it had been a petition in equity, the plaintiff would have been entitled to recover. Under these circumstances I think that it will be best for the parties to agree to have judgment entered up for the plaintiff for the amount without costs; but if they cannot come to any amicable arrangement, I shall give the plaintiff leave to amend in the manner suggested.

⁽a) Tit.—Contribution vol. 1. p. 521. pl. 19 "A decree against several for payment of costs is joint and several, but the costs given by it are in the nature of a debt, and therefore there must be contribution between the parties liable. Archbishop of Dublin v Lord Trimblestone 13 Irish. Eq. R. 98."

26th April 1862.

In the Admiralty.

Before the Hon. Sir P. B. MAXWELL, Recorder.

The Augustin Grangier at the suit of Kadirsah owner and Master of the Schooner Flora.

If a vessel meets another in distress and renders assistance and is thereby prevented from proceeding on her voyage and looses anything by not proceeding on such voyage, the vessel assisted will not be liable to make up such loss unless the Captain or person who has the power to do so, promises to pay it.

SEMBLE.—If a person makes an extravagant claim for salvage and thereby hinders an amicable settlement, still he should be allowed his costs of suit for by disallowing costs others might be deterred from giving salvage assistance or suing in Court for a just reward for such assistance.

This suit for salvage was heard on the 16th and 17th instant. The facts of the case sufficiently appear in the judgment. Mr. Rodyk was counsel for the petitioner. Mr. Aitken appeared for Capt. Cotineau of the Augustin Grangier. His Lordship in giving judgment said that in dealing with claims of this kind, it was the practice of the Courts to act in a liberal spirit, for it was important for the interests of commerce and of humanity also that those who rendered services to ships or mariners in distress should be well rewarded. In measuring the remuneration to be awarded the Court had to take a variety of circumstances into consideration. It had to consider the value of the property saved, the degree of danger in which it had been placed; the degree of danger, also to which the salvors exposed themselves, and the degree of skill and energy exercised by them. It had also to consider the value of the property used in effecting the salvage and the risk incurred by it. Where the danger was great and the service highly meritorious as much as half of the property saved might be awarded to the salvors. On the other hand there were cases where the service was sufficiently remunerated by measuring it as ordinary work and labour would be measured. These principles, which seemed to be dictated by common sense, were the principles of the general maritime law. by which he was to be governed in the case. The question which he had to decide was: what remuneration, on these principles, Kadirsah and his crew were entitled to? The circumstances under which the claim arose were, these :- On the 10th February the Flora was lying at anchor in the roadstead of Acheen. On that day the French ship Augustin Grangier came into harbour with a signal of distress flying; the mate of the Flora, one Wahid, went to her in the boat of the Flora, and learned from Capt. Cotineau that his ship had been on fire for five days. Wahid advised the Captain to go on shore for assistance and offered to act as interpreter to which the Captain said he would do so as soon as his men had dined. Wahid then left the Augustin Grangier and soon after leaving an explosion took place on board the burning ship. The French Captain received some slight injuries and he considered it prudent to leave the vessel with his crew and to go on shore for assistance. He and his two officers and crew left in three boats taking with them their chests, bedding and the more portable things on board such as chronometers, sextants, fire arms and other articles. The Flora lay between them and the shore and as they were passing her, some of her crew beckoned to them. The Captain on consulting with his officers pulled up along side of her, when Wahid invited them on board the Flora and dissuaded them from going on shore, saying that

if they attempted to cross the bar as the sea was rough the boats would probably be upset and they would then be certainly plundered by the natives. They accordingly went on board, and the goods that were in the boats were also taken on board. So far, it was quite clear that the Flora had no claim to salvage on the goods in the French boats that had been saved by the French crew, and were put on board the Flora at the invitation or request of her mate. Two hours later, about 4 P. M., two of the French hoats manned the one by the French, and the other by three Frenchmen and five of the crew of the Flora went to the Augustin Grangier and succeeded in saving a further portion of goods. At eleven o'clock P. M. Kadirsaw, who had been on shore all day. came on board, and after expressing much concern for the misfortune, and begging Captain Cotineau to make himself at home on boad the Flora, he advised him to take immediate measures to save what property he could, as he had observed plunderers putting off from the shore. Two French boats were at once manned by the crew of the Flora, accompanied by two French seamen. And a further quantity of goods was carried to the Flora. In the morning again, further trips were made by the same boats and men, and also by the French long boat manned by the French crew, and more property was saved. It had been sought in the course of the case to distinguish what goods had been saved by the French and what by the Malays, but he thought that in measuring the amount of salvage he ought to take it that all the goods except those brought on board the Flora by the first boats were saved by the instrumentality of the Flora. If the salvage service for which remuneration was claimed had ended here, the reward could not have been great. The property saved was of very trifling value, 1,800 dollars; the danger was very trifling, for though the ship was on fire, it was not till the morning of the 12th that she sank, so no immediate peril was to be apprehended. Nobody appeared to have received any injuries or to have been exposed to any. It was a calm night and the sea was smooth, the vessels not a mile apart. The preperty of the Flora was not put into any jeopardy, for the service was wholly performed in the French boats. Kadirsaw said that there were plunderers from the shore about the vessel but it is not suggested that any molestation was attempted by them or that any was apprehended. If then the salvage ended here he should have thought that a liberal remuneration for work and labour, say about fifty dollars, would have sufficed. But the claim did not end there. Indeed it rested chiefly on what took place afterwards, and properly was rather a claim for freight or passage money than salvage. The Captain and crew of the burnt ship remained on board of the Flora at Acheen for 18 days and they then came in her to Penang. Now Kadirsaw said that the French Captain had to pay him for bringing them here as much as he (Kadirsaw) could have made if he had continued his trading vovage. He said that he was bound to the West Coast of Samatca, and that if he had prosecuted his voyage he would have made the following profits, all of which he now claimed. He said that "if he had proceeded to the West Coast with his unsold goods the profit would have been at least If that he had loaded Pepper, Benjamin, Gutta Percha, Camphor,

And for the 17 seamen	170.
He further claimed a sum of 500 dollars which he said he had	
paid to the Rajah of Acheen for the purpose of putting a mark on	
the place where the French ship was burnt and sunk in Acheen	500.
Loss sustained on the remaining goods shipped by him at Penang	
for Acheen and brought back	350.
75.14	A 4100

Making a total of Sp. Dollars \$ 4120.

But the claim did not end there. Kadirsaw demanded, further, for him and his crew one half of the property saved from the French ship. Such was the modest claim preferred by Kadirsaw, the owner and Master of a vessel sailing he regretted to say, under the British flag; and if such a claim could be allowed, he could only say that it would probably be better for ship wrecked mariners to fall into the hands of pirates, for in that case they would at all events not be asked for more than the property about them. Undoubtedly, if Capt. Cotineau agreed to pay the amount of these profits Kadirsaw would be entitled to recover them; but he not only denied having entered into any such agreement. he said that he had repeatedly explained to Kadirsah that he was unable to enter into any agreement with him, that he must leave him to settle for his remuneration with the French Consul, and, on Kadirsah observing that he might not agree with that functionary,...that if so, he could appeal to the British authorities of Penang, Capt. Cotineau said further, that Kadirsah had then said that he would sail to the pepper ports for a cargo, to which he had replied that he would go with him and take his chance of finding an American or French vessel there. He (the Recorder) had no hesitation in believing Capt. Cotineau's representation of what had passed; and it was not, therefore, necessary for him to enter into any inquiry into the nature of this claim for lost profit. He thought it a most unfounded as well as an extortionate charge; but his opinion on that subject should not prevent him from awarding what he thought would be a liberal remuneration. The interests of commerce as well as of justice required that he should be properly compensated, whatever might have been his conduct afterwards in making such demands. Now, it had been, proved by a Chinese ship owner that a vessel such as the Flora, a schooner of 83 tons, would be handsomely paid for a voyage from Acheen to this place, with 320 dollars. The ship owner would not be likely to undervalue the freight, and Kadirsah was at liberty to go to the pepper port and get pepper if he liked. If he did not do so, it was because he did not think it worth his while. In truth, he could not help thinking that when Kadirsah found the French crew and their property on board his vessel, he began to turn his mind which would be the more profitable speculation, to proceed with his voyage, or to carry the Frenchmen to Penang; and he determined the latter was the best. He (the Recorder) thought that about 300 dollars would be quite enough for the passage from Acheen to Penang. As to the claim for provisions, when he had called on Kadirsah for an account of what he had supplied, he was unable to give any. He said he had lost the list which he had made, and could give no idea of what he had supplied. Captain Cotineau, however and his chief officer had supplied the information needed; they had kept a daily account of what they and the crew had obtained from the Flora; and it appeared that so far from amounting to 200 dollars, the value of the things supplied could not amount, on any reasonable computation, to 20 dollars. Kadirsah had put a o too much, and

this fault seemed to pervade the whole demand. He (the Recorder) should not have allowed more than 20 dollars, for these provisions, but at Capt. Cotineau's request he would allow 40 dollars. Upon the whole then he would allow 390 dollars for this salvage service.

With respect to the 500 dollars, Kadirsah said that the Rajah of Acheen had been angry with him for taking on board his vessel the crew of the Augustin Grangier, instead of suffering them to go ashore, and that he had kept Kadirsah for a week on shore and had not suffered him to return to his schooner and sail, until he had deposited 500 dollars, or dollar's worth of property, to secure his, or the French Consul's placing a buoy with chain and anchor over the spot where the Augustin Grangier sank. If this were true, it was not unreasonable that Kadirsah should be indemnified. At first, indeed, it seemed hardly consonant with justice that the Rajah should make the owner of the Flora responsible for the sinking in the roadstead of another vessel over which he had no control. But when it was recollected that those who might have been liable had placed themselves, and their property as it were, under Kadirsah's charge or protection, it was perhaps not unreasonable that the Rajah, not wishing to interfere with them on board a vessel carrying the English flag, should have said that the man who had interfered between him and those primarily liable, should. himself be liable. But he (the Recorder) confessed-that he was not quite satisfied that any such transaction had occurred. When Kadirsah mentioned the matter to Capt. Cotineau in the harbour of Acheen, the latter undertook that the buoy &c. should be provided by the French Consul, but required that a certificate that the \$ 500 had been paid by Kadirsah should be in due course obtained from the Rajah and presented to the French Consul here. Now. Kadirsah had not produced this certificate, and its absence is a suspicious circumstance. It is suggested, also, but I have no evidence on the subject, that the Augustin Grangier sank in 8 or 81 fathoms water, and if so the anchor and chain were probably not necessary. He thought that the proper course, under the circumstances, would be to postpone the determination of this part of the claim, and to order that 500 dollars should be paid into Court, with liberty to Kadirsah and the parties representing the Augustin Grangier to apply. Out of the 390 dollars, 50 dollars or half a month's pay would be paid to the crew. On the question of costs he had some doubt as to how he ought to exercise his discretion in respect of them. The extravagant claim of Kadirsah had no doubt prevented an amicable settlement, but he (the Recorder) should be sorry if by refusing costs he should deter others from giving salvage assistance or suing in Court for a just reward for such assistance. Upon the whole, he would allow the petitioner his costs, not exceeding one hundred dollars.

~~~

#### June 4. 1862

Before Sir P. BENSON MAXWELL, Recorder.

### Coopan Chitty and another v. Bain.

If a vessel on which a Policy of Insurance has been effected, is not seaworthy at the beginning of the voyage, the Policy never attaches, and no action can be maintained on it even if the vessel be lost, and the person effecting the Insurance, had no notice of the vessel not being seaworthy. It is not material in such a case to enquire from what cause the loss has arisen.

THE JUDGE.—This is an action on a Policy of Insurance effected by the plaintiffs with the defendant upon goods and merchandize in the good ship or vessel called the Alert at and from Penang to Nagore, with leave to touch at other places, &c. The loss is averred to have been caused by the perils insured against. The only plea is that the ship was not seaworthy for the voyage at the commencement of the risk; and the only question to be determined is whether the plea has been established by the evidence before mc. As the plaintiffs, however, are natives of India, and they may not fully understand the nature of their contract with the defendant, it may be as well that, I should begin by stating shortly that it is an elementary principle of law that he who obtains from another a Policy of Insurance for a voyage, whether on ship or goods, impliedly warrants that the ship is seaworthy at the beginning of the risk,—that is, that her hull is staunch, strong and properly constructed, that she is properly provided with sails, anchors and other stores, and with a competent master and crew (and pilot where necessary), that she is not overloaded, and that her cargo and stores are properly stowed;—having regard, in all these matters to the probable perils to be encountered on the voyage. This implied warranty, or condition precedent, is the basis of the contract between the insurer and the underwriter in every voyage Policy. It is assumed that the bargain relates only to a ship which is seaworthy, or rather, which will be seaworthy when she sails. The condition that she shall be seaworthy for her voyage attaching at the beginning of the voyage, if she is not seaworthy then, the Policy falls to the ground, or, as the phrase is, never attaches; the condition on which the bargain rested failing, the obligation fails also. It is not therefore material in such a case to inquire from what cause the loss has arisen. In Wedderburn v. Bell I Camp. 1, where the ship which had been intended, but not warranted to sail with convoy, foundered at sea in a hurricane. the underwriter was held by Lord Ellenborough not liable, not because her hull was not seaworthy, or her sails to be used in stormy weather were not in good condition, but because her main top gal-

lant sail and studding sails, which are useful in light breezes, were rotten and unserviceable. Not having been properly supplied with sails, she was not seaworthy, and the Policy was void. So, it has been held in America; (in Starbuck v. N. E. Insurance Co. 19 Pick 199) that if the ship is not seaworthy at the begining of the voyage, the insurer is not liable for a loss, even if it arose from another cause. And the rule as I have said is the same whether the Policy be on ship or on goods. In the case just referred to before Lord Ellenborough, the Policy was on goods; and in Oliver v. Crowley, Park, Ins. 470, 8th ed. which was an action by an innocent shipper of goods who had no interest in the ship, Lord Mansfield nonsuited the plaintiff, upon its being proved that the ship was unseaworthy at the beginning of the voyage, observing that the implied warranty could not be dispensed with in any case. I ought to add, as there was some controversy as to the fact at the trial, that it is immaterial whether the assured was ignorant of the unseaworthiness of the ship or not. "It is clear law" Lord Eldon says in Douglas v. Scougall 4 Dow 276, "that however just and honest the intentions of the owner (or assured) may be, if he is mistaken in the fact, and the vessel is in fact not seaworthy, the underwriter is not liable." All this is well settled law, and necessary to be stated here only in order that the plaintiffs may understand the real nature of the dispute between them and the defendant. I now proceed to consider the facts of the case.

The Alert sailed from Penang on the 28th of August, anchored for 24 hours off Pulo Tikus, about  $4\frac{1}{2}$  miles from the harbour, and then proceeded on her voyage. She arrived in the Madras roads on the 3rd of October, and sailing thence for Nagore on the 5th. She grounded on the 7th between noon and 1 P. M., about five miles off Cuddalore, under circumstances which led to an investigation at Madras, but of which it is enough for the present case to say that they do not appear to have been immediately connected with the seaworthiness or unseaworthiness of the vessel. The weather was fine, and the wind light; and it did not appear that she was beached to save life or property on board. She was wholly lost, and so were the goods insured by the defendant.

It has been well observed that in questions of the kind now before me the most satisfactory evidence is that of the person who serveyed the vessel before she sailed. Unquestionably, if a competent surveyor thoroughly examined every part of her hull, rigging and stores, his account of the state of the vessel is entitled to the greatest weight. But the value of his evidence, it is manifest, must depend entirely upon his professional skill and knowledge, and upon

the degree of care with which he made his examination. In this case, the surveyor who examined the Alert shortly before she sailed was called, and the survey report made by him was put in. Captain Shepherd is the surveyor of Lloyds and of several Insurance Companies; and no question was made as to his competency. He said that he had surveyed the Alert in 1857, 1858, and 1859, and again in May and August 1861; but that in his first survey, he had found her so good a vessel, that he "did not survey her much" afterwards, She was built in Java in 1851, of teak and was "as strong," to use the expression of one of the witnesses, "as wood and iron could make her"; and she was registered A. I. 12. It appeared also that she had from the time when she was launched, what is called a steady or chronic leak of an inch an hour; that is, a leak arising from some defect in the orginal construction of the vessel, and which goes on uninterruptedly and at the same rate in all weathers. This leak, it was admitted, did not make her anseaworthy. When Captain Shepherd visited her in August last, he was told, he said, by the Captain ( Price ), that the vessel had made a little more water than usual on her passage from Rangoon, and that he knew where the leak was. He took Captain Shepherd down to the lower forecastle, where the sound of water oozing into the ship, a little below the copper line, was heard. The vessel was lightened, and a portion of the port bow was stripped off the copper, of the sheathing plank (which was uninjured and from 1 to 3 of an inch thick ) and of the felt ( of the thickness of a blanket ) which covered it; and a hole of about the size of a dollar ( a rat hole, according to Captain Shepherd, or a hole made by the rotting away of a knot, according to the carpenter ) was found in the plank. The hole was above water when the vessel was light, but below it when laden with an average cargo. He also examined the copper, and had six sheets of it, one here and there, on the portside, stripped where there were blue patches, to try the caulking, and he found it good. The plank in which the hole was, was removed, and a new one was put into its place. Captain Shepherd found that the bends, topsides and woodends above the copper needed caulking and they were caulked. When the repairs were completed Captain Shepherd considered, and he certified in his survey report, dated the day of their completion, (19th August, ) as he also stated a few days afterwards to the defendant, that he considered the state of the hull "good", and the vessel generally " a good insurance risk." He was satisfied that the hole pointed out by the captain was the cause of the leaking which had occurred on the recent voyage, for he considered that it gave the sliep twelve inches, or more,

of water an hour; enough, in his opinion, to keep one pump continually, or two pumps occasionally, for & an hour at a time, at work to keep her dry; and he had inferred from the sound, that water came from one hole only. But Captain Shepherd did not examine the hull further. He did not go down to the foregastle after the repairs were finished, to ascertain whether the vessel was then tight and staunch, or whether there was still a noise of water oozing: nor did he sound the well. As he observed, when a-ked whether he had done so, or made other inquiries, he had learned from the captain where the leak was, and he trusted the captain. He said it was usual to take the captain's word and he had followed the custom. But it must be observed that the evidence of a surveyor who does so is of much less value than that of one who trusts to nobody, but personally inspects everything himself. The evidence which is the result of his personal inspection is of great value; but all the evidence which rests on the information or opinion of others, is worthless. I think that Capt. Shepherd was led by his knowledge ever since 1857 of the strength and good quality of this vessel. to survey her with less care than he would bring to the survey of other vessels. I will even add that it was perhaps not unreasonable that after he had found and repaired what he considered an adequate cause of the leak, he should think it unnecessary to make any further search. But still, the fact remains, that his survey was not of a character to be by any means conclusive on the question before me.

The next witness, whose evidence is of great importance in this case, is the carpenter who executed the repairs. Now, this witness, Chin Hah Hiang, who was called, not by the plaintiffs but by the defendant, says that before beginning the repairs, he heard water coming in at both sides of the bow. He further says, that after the plank with the hole had been replaced, he went down again, and heard water entering at the starboard bow, two or three feet from the cutwater, about four copper sheets down; that he cut away a small quantity of the skin of the ship and passed in his hand, when he felt the water coming in. It dropped as rapidly as the ticking of a small watch. He observed to Capt. Price that she had " more leak," and suggested that he should haul her up and strip the copper at her bow; to which the captain answered that there was no money, that the ship was expensive, and that he must go to Madras and then to Calcutta, when he would see the owners and go into dock. This witness also said that after he had completed the repairs, he visited the carpenter of the Alert on board. and observed pumping for healf an hour at a time. It was said

that the dropping spoken of could not have been a leak, but must have come from the deck; and certainly it seems very probable, as Capt. Wright observed, that a leak in the side of a vessel, from bad caulking or from a butt being started, would trickle silently down the side; but Capt. Eaglesham thought that water oozing in would drop as described by the carpenter, if a bolt or treenail had been in the way. Captain Stewart was of the same opinion; and I am unable to discover any absurdity or error in such a view. It would be strange if an experienced ship carpenter were to mistake a dropping from the deck, for a leak in the side four sheets below the copper line. It was contended that his evidence was open to much doubt. as Capt. Shepherd had, when he went down, concluded that water was coming in from one place only; but Capt. Shepherd did not go down again to test the correctness of his opinion, and his inferences cannot therefore weigh against the positive evidence of the shinwright, who certainly can hardly have had any adequate motive for making, in this case, a statement which if false, was wilfully false It was also contended that his alleged conversation with the captain was an invention; but Capt. Shepherd furnished, in the course of the case, a piece of evidence which seemed to be to prove its truth in a very striking manner. At the foot or corner of the copy of the survey report which he gave to Capt. Price, he recommended that the Alert should be docked and coppered on her arrival at Calcutta. If so, the captain's answer to the carpenter was just what might have been expected. It was merely stating that he intended to do that which had been recommended by the surveyor; and certainly it would be a singular conclusion to come to, after this, that the carpenter invented the statement. This memorandum also seems to corroborate the rest of the carpenter's evidence; for certainly, a recommendation that the vessel should be docked and coppered when she reached Calcutta, shows that the person who made it did not differ very materially from him who suggested that she should be examined at once here. The entry originally made in his survey book appears to have been to the same effect. After describing the vessel as fit for a dry and perishable cargo "for this voyage only," "something was added," says Capt. Shepherd, "about copper being worn, and recommending that it should be shifted." For these reasons, then I think the carpenter is entitled to belief; and another reason for believing him is the absence of all exaggeration in his statement. I cannot but think that if he had been disposed to depart from the truth, he would have spoken of something more formidable than a mere dropping of water; a description which, he must have known. was not calculated to convey the notion of a dangerous leak.

as to the bearing or significance of his evidence upon the question at issue, I must say that I should not be disposed to attach much importance to the fact of which he speaks, per se; for I should find it difficult to believe that a leak of water dropping, drop by drop, into a vessel of 300 tons could be of serious moment. If it be important, it can be so, as it seems to me, only so far as it may serve as an indication of the probable existence of other defects of the same nature, or of the ship having received some injury. So far, however, it would only afford ground for conjecture.

There is however, another branch of the evidence, which, if true, leads to the same conclusion, but with more certainty. Capt. Miller. who was in Penang harbour last August, and for some days after the Alert sailed, noticed pumping in the morning and evening and sometimes during the day. It was not so much the quantity as the colour of the water which attracted his attention. It was clean water (the sign of leaking) which he saw pouring out of her scuppers. But as he could not recollect at what period of her stay here he noticed these matters, it may well be that he spoke only of her state before she was repaired. Captain Laycock, however, of the Indian Navy, commanding the surveying brig Minx, seems clearly to refer to the latter period of her stay, and after the repairs were finished. He says that he was living on board his own vessel, which lay close to the Alert, a few days before the Alert sailed, -her repairs it must be remembered, were finished on the 19th and she sailed on the 28th—and that during that time he saw this vessel pumped three times a day, viz; at 7 or 8 a. m. and twice in the evening between 5 and 10 p. m. for from 30 to 45 minutes each time; that he was usually on shore between 11 a.m. and 3 p. m., but that on one occasion, being on board at noon, he had noticed pumping going on at that hour. Abdul Kadir, the stivadore, who was on board daily from 6 a. m. to 6 p. m., said that when she first arrived from Rangoon, she was pumped three times a day for from 1 to 1 an hour at a time; that after she had been lightened, by the removal of her eargo, the leaking ceased, and she was not pumped for three days running; but that on being half loaded for Nagore, she began to make water again, and was then pumped daily three times, though for only 5 or 6 minutes each time. Captain Shepherd said, in answer to a question, that after the repairs had been executed, there could be no necessity for pumping the ship three times a day; but here are two witnesses who speak to her being so pumped after the repairs. But it would seem to result from their evidence, that the Alert was pumped four times a day, from the time when her cargo was put on board untill she sailed; since Abdul Kadir speaks of three times between

6 and 6 o'clock, and Captain Laycock, a witness to two of those times, saw a fourth time at 10 p.m. Then for how long each time did the pumping continue? I am unable to discover any reason for distrusting the accuracy of Capt. Laycock, and none was suggested. at the trial. He was close to the Alert; his experience in all matters connected with shipping would probably make him note such a circumstance as this frequent pumping in port, and note also its duration. The tone of his evidence seemed to me impartial and moderate. while the stivadore, a person in the employment of the ship's agent. seemed to me not willing to make any statements to the prejudice of the ship. I doubt whether his statement as to the length of each pumping was as accurate as that of Caytain Laycock. These witnesses then seem to me not only to confirm the evidence of the carpenter, but to prove that there were good grounds for inferring that the vessel had other leaks besides the dropping heard by him, if, as I think, that dropping did not suffice to account for the pumping observed.

The history of the vessel on the voyage before her arrival in August, and on the subsequent voyage to Nagore throws more light on the question. She arrived here from Singapore last May and proceeded in the same mouth on a voyage to and from Rangoon. Lawton, who was her chief mate says that on going to Rangoon she made more water than usual. For the first two or three days, she was pumped, he says morning and evening only, to the best of his recollection but for the rest of the voyage every four hours, night and day; for half the time only one pump was used, for 15 or 20 minutes at a time, when worked properly; then both pumps were used for 10 or 15 minutes at a time. On the return voyage to Penang, she was numped every two hours with two numps, because, he said, he did not wish to wet the cargo. The men took an hour to pump. when they were in a state of mutiny, but at other times 15 minutes This was probably short of the exact truth, for he says that the vesselmade, on an average, five inches an hour, and he says also that it would take a quarter of an hour to pump that quantity. Double the time at least would therefore be necessary for double the quantity, every two hours. Lambert's evidence is much to the same effect. The boatswain speaks of even more frequent and continuous pumping; and the four other seamen who where examined under a commission speak to the same effect. But I think that it is not necessary to go further than Lawton's evidence to see that the Alert was making more water than she ought. Besides speaking of the numping, as I have just mentioned, Lawton says that on this voyage, he discovered two leaks, one in the bluff of the bow, and the

other at the stern, some 12 or 15 feet apart, both on the port bow. The former was repaired at Rangoon, by removing the copper and caulking the place, up to the stem, and then putting on new copper. But this did not stop the leaking. Lumbert, the gunner, goes further, for he says that on the return voyage from Rangoon, he and the Captain of the hold cut several places in the inner skin of the ship. on the port side of the bow; that they heard water pouring in at two places, and that when the vessel pitched, the water flew out on them from different places over a space of about five feet. Hussein, the boatswain, also says that on the removal of a part of the skin on this occasion, he saw water, not dropping, but running like in a drain near a rib, and also at the cutwater and heard water in two or three other places, on both sides; but the starboard side was not examined as ropes were stowed away there. There may be some exaggeration in all this, as was urged by the learned gentleman who represented the plaintiffs at the trial, and it may be true that the cargo (rice) sustained little damage, as was said by the consignees of it; but I cannot doubt Lawton's statements on the subject. He was called by the plaintiffs, and was evidently not a hostile witness or disposed to exaggerate her leaking condition; and I take it then to be established that on returning from Rangoon, the Alert made 5 inches an hour on an average, pumping every two hours.

Such being her condition on the voyage which ended at Penang in August, what was her condition, on the voyage from Penang to Nagore, the voyage for which the insurance was effected? The evidence on this part of the case is very imperfect; but as far as it goes, it is entirely consistent with that which bears on her condition in the harbour and on the Rangoon voyage. None of the officers or crew who sailed on the Nagore voyage were called, nor were the logs produced. It is true, the proceedings at the investigation held at Madras after the wreck under the Merchant Shipping Act, were put in by consent of both parties; but they afford little information on the present question, which was not the question there under inquiry. Chin Hah Hiang, the carpenter before mentioned, says that he accompanied Captain Price to the ship on the morning of her departure, to be paid for a plank, and that during the hour and a half that he remained on board the vessel, being then off Pulo Tikus. pumping was going on. There is probably exaggeration here. The other witnesses on this part of the case are two Malay passengers, whose evidence was given under a commission. These men. Mahomed Tabir and Mahomed Hassan, say that they observed pumping on the day when they embarked (the day before the Alert sailed). The former thinks that she was pumped twice the latter observed

pumping once only on that day; but no inference can be drawn from threse statements for it does not appear at what time of the day they respectively embarked. The next day (when they dropped out of the harbour and anchored off Pulo Tikus) the vessel was pumped two or three times, according to Mahomed Tahir, but four times according to Mahomed Hassan, who adds that this continued daily until they reached Acheen Head. Mahomed Tahir speaks more generally of "three and four times," or "two, three or four times" daily during that portion of the voyage. Unfortunately, it does not seem to have occurred to either side to inquire how long each of these pumpings continued, or whether one or both pumps were used. But as to the former point. I think it may safely be inferred that the pumping at sea was not less frequent nor less long than that which took p'ace in the harbour before the Alert sailed. Until she reached Acheen Head she had fine weather. There she met with rough weather which appears to have continued with little or no intermission until she arrived in the Madras roads. From the time of her leaving Acheen Head, all the passengers (how many they were does not appear) were made to pump as well as the crew. "We never ceased pumping during heavy weather." says Mahomed Tahir, "but we did not pump so often during fine weather." "We rested at short intervals to take our meals," says Mahomed Hassan. Both witnesses speak also of the ship making "lots of water;" but how often she was numbed daily and what quantity of water she made, is left in doubt by these witnesses They do not even state specifically whether one only or both pumps were used, though from the fact that they and the examining counsel speak of "the pumps," of being "put to the pumps" &c. but still more from the fact that it was found necessary to put the passengers to this work, I think it is to be inferred that both pumps were used in the bad weather. Price and Cochrane, (the chief mate) say that the passage was "rather rough," and that they lost a few sails. But there is no evidence as to the state of these sails. Price says also that the ship "became leaky," making 21 to 3 inches per hour. Cochrane says that she made from 1 to 24 inches water in an hour according to the weather. He says also that she was pumped every two hours; and it appears from the extract from the log, from the 3rd to the 7th of October, which is appended to the Madras proceedings, that she was pumped daily at those intervals, on the 3rd, 4th, 5th, and 6th, though the weather was not had then,

Whether the ship made as little water as this, seems to me open to much question, having regard to the rest of the evidence. The Alert had no sounding well, and Lawton said that on the Rangoon

voyage he seldom sounded, as it was too troublesome to take off the boxes. This circumstance, and the fact of their disagreement as to the quantity, seem to show that they spoke not from actual sounding, but from conjecture. Lawton says that if the men worked willingly, they could bump five inches in a quarter of an hour; agreeing substantially with Capt. Smith who says that the crew could pump from 8 to 10 inches in 25 minutes; and when she came down from Rangoon with a cargo of rice, making five inches an hour. Lawton says he pumped her every two hours with two pumps. But if it was necessary to pump her as often on the passage to Madras and to keep the crew and passengers at the pumps anything like as continuously as the two passengers seem to convey, it is difficult to imagine that the ship made less water then than on the Rangoon passage. On the Rangoon passage indeed, Lawton says that he pumped as frequently as he did in order to keep his cargorice, dead weight, lying on the dunnage at the bottom of the holddry; but I do not understand that the Madras cargo, consisting of betelnut, rattans, mats and China crackers, was likely to be stowed in a way to require more care in this respect. The passengers do not complain that they were worked capriciously, and there is nothing to lead to a suspicion of anything of the kind. Capt. Shepherd says, indeed, that from this frequent pumping no inference of unseaworthiness is to be drawn. It is a common practice, he says, to ''jog out'', (that is to pump without sounding) a ship every two hours in rough, and perhaps every four, in fine weather, and that as the Alert had no sounding well, this was a good reason for doing But I think that the passengers evidently speak of something more than a "jog out"; the mate, too, as the log shews, says that she was pumped every two hours even when the weather was not rough; and when we have the captain stating that the ship "became leaky"; I think it plain that the pumps were not worked more frequently than was actually necessary.

The state of the vessel on these two voyages strongly corroborates the evidence as to her condition in the harbour at the beginning of the voyage. But the evidence for the defendant does not stop here; he undertakes to account for her condition, by evidence of her having met with two accidents upon earlier voyages. Lambert, the gunner, says that four or five days after he joined the Alert at Calcutta, in October 1860, she grounded on a sand-bank in the Hooghly, and remained there for a tide. But I do not think that any importance can be attached to this incident, because there is no sufficient evidence of the vessed having suffered any injury from it. The same witness, however, and a seaman named Kaight say that

on the voyage from Singapore to Penang in April or May 1861, after passing Malacca, the ship struck on a sand bank N, of that place and bumped on it, Lambert says for 3 hours, Knight says for about 54 or 6 hours. It was about half an hour after miduight, according to the latter; it was 34 a, m. according to the former. Both agree that it was fine weather, that she went on by the head, and came off with the tide and a favourable breeze at about 6 or 61 a, m. Before this accident, the vessed used to be pumped, according to Knight, morning and evening in fine, and every four hours in bad weather, but according to Lambert, (though here I suspect some mistake,) every four hours and sometimes every two hours even, for about 20 minutes. After the accident, they agree in stating that she was pumped every two hours for 30 minutes, and sometimes more, till she came to Penang, where, according to Knight, she was pumped four times a day, until he left her, some 15 or 18 days after. Lawton, who joined her on the 25th of May, a few days, I think, before she sailed for Rangoon, contradicts this, for he says that when the Alert was, in the harbour, she was pumped: only twice a day, morning and evening for 15 or 20 minutes each time, which, as I have already mentioned, is what he says of her also for the first two or three days after she sailed, "to the best of his recollection" I do not think it material, however, to consider which of these two statements is the true one. The question here is, whether Lambert's and Knight's account of what occurred off Malacca is substantially true, or a sheer fable. I was asked to disbelieve it altogether; but I see no reason for doing so. There may be some error or exaggeration in the details; but it is unreasonable to suppose that these two men deliberately invented the whole story, for the purpose of imposing upon the Court in a suit in which they have no interest, and between parties with whom they were, in all probability, previously unacquainted. But independently of this, I think it worthy of belief, for it is not only entirely consistent with what all the other witnesses have said of the subsequent condition of the Alert, but satisfactorily accounts for the facts which they stated and which call for explanation. They say that the Alert leaked. and that her leaks were all forward; Lambert and Knight say that she struck on a sand-bank, and that it was the bows of the ship that were aground. Captain Shepherd says that no report of any such occurrence was made to him by the captain when the vessel arrived here in May, and that he did not hear of it from any other quarter. But this cannot weigh against the evidence of Lambert and Knight who swear to it, especially as no other explanation of the condition of the Alert on the subsequent voyages is offered. Captain Price

may have had his own reasons for not desiring to communicate the circumstance, and I think that it may be inferred from Captain Shepherd's disposition to trust the captain that it may well have happened, and yet not have become known to him. The latter said that if she had bumped as described by the two witnesses, she would have started her fastenings, her copper would have been wrinkled. and she might have been hogged (that is, curved with the centre up and the extremities down); and he observed no appearence of this. But the extent of any such damage must have depended materially on the state of the weather. Capt. Miller who speaks of the possibility of her being hogged, says only that he would expect such a result if she had struck in rough weather, which was not the weather spoken of. Captain Wright and Captain Eaglesham, gentlemen apparently of much experience in these matters, would have expected from the accident, a loss of copper and consequent damage by worms to the ship's bottom; but as she was not examined, there were no facts in evidence in support of this view, however intrinsically probable it may be. Captain Eaglesham, however, suggested another consequence as likely to follow from the accident, which appeared to me quite as probable as any other, and as at the same time accounting for the dropping heard in the fore part, and the fore part alone, of the ship, "She might have strained," he said, "and if she strained much, her fastenings forward would have been loosened" agreeing, so far, with Capt. Shepherd. This was damage which would not, according to the same witness, shew itself till bad weather came, and he added "if she had nothing but fine weather between that time and her meeting the bad weather off Acheen Head, I should attribute her beginning to leak then to what had passed on the bank, otherwise not". But in answer to a further question, he said that "even if she had met with bad weather before'-that is before meeting it off Acheen Head, but after the accident,-"I should suspect the same cause." This is a point upon which I should have been glad of further information; but after giving it all the consideration in my power, I cannot but think that Captain Eaglesham's opinion is well founded. In calm weather, the sides of the vessel might well exclude the water, the planks remaining in their original position, the copper, the sheathing and other such matters sufficing to keep them in that position, though the bolts which fastened them to the timbers of the ship might have been loosened; and yet when the vessel pitched or rolled in rough weather they would yield to the pressure, and admit water into the ship. This is, however, a subject on which my opinion is not of value; and if I express any, it is for the purpose of stating my reason for thinking the opinion of the scientific witness sound.

I think it, then, established by a mass of evidence coming from · independent sources, and bearing upon different facts, but all concurring to the same conclusion, that the Alert, when she began the voyage from Penang to Nagore last August was making water at a rate requiring that she should be pumped for half an hour at a time at least three, but more probably four times a day, and that the cause of her so leaking is to be traced to her having struck on a sand-bank a few months before. The question now remains, was the vessel seaworthy in that condition-that is, was her hull so tight, staunch and sound as to be in a condition to resist the ordinary attacks of wind and weather to which ships in the course of the same voyage are liable, to be exposed? It was said that her having reached the Coromandel Coast was a proof of her seaworthiness; but though this fact is justly entitled to great weight-and it has weighed much with me-it is not decisive; for a ves el may be navigated safely to her destination and yet not be seaworthy. It was also urged that the captain's taking her to sea was a sufficient contradiction to the representations of her leaking in harbour, as no man would deliberately and intentionally expose himself to destruction; but without stopping here to consider the evidence of Captain Shepherd, Mr. Padday, Mr. J. Rodyk and the defendant on the subject of the captain's conduct before sailing, I think it enough to say that all that can, in my opinion, be justly inferred from it is that he considered that the vessel might be safely navigated to the southern coast of India, whether tight and staunch or not, question before me cannot be disposed on such mere surmises as these, and I pass over therefore without further notice, the inferences which were pressed upon me at the trial on the part of the defendant, as arising from the conduct of the captain in not returning from Pulo Tikus for survey when applied to by the defendant. The material question is what is the opinion of the skilled witnesses upon the facts which I consider established? The question of seaworthiness does not admit of determination by any positive and ascertained standard; and I must be mainly guided in deciding it by the opinion of men who have made the sea their profession, especially in these seas. In weighing these opinions, however, it is necessary to consider the grounds on which they are founded. Thus, when witness after witness, in answer to the defendant's advocate, said that he could not consider the Alert seaworthy after sustaining such a shock as she must have sustained on the sand-bank off Malacca, until she had been docked, it is obvious that all that he meant was, that after such a shock he could not affirm positively

that she was seaworthy, without having ascertained that she was so; or, at the utmost, that it was prudent to presume against her seaworthiness until the contrary was proved by a survey. And nothing more than this was meant when Capt. Shepherd said, that he should think her unseaworthy after three hours' bumping on the sand, and that he would not have passed her, but would have docked her or hove her down, if he had been aware of the accident. All this can be nothing more than mere speculation and conjecture. But when frequent pumping is found necessary after such an accident, the inference to be drawn is no longer conjectural. It proves that an injury has been sustained, and the question comes, can the extent of the injury be inferred from the frequency and duration of the pumping? Capt. Smith, seemed to think not, "I know nothing of pumping," he said in answer to a question on this subject; "tell me what quantity of water she made an hour." So, Capt. Shepherd said in one part of his evidence that the only criterion was to sound the well. It may be the best, but it can hardly be the only criterion. The incessant working of the pumps on board a vessel must surely be as convincing evidence of her leaking as the discovery of a hole in her hull upon a regular survey. Indeed, Capt. Shepherd expressed last August or September, when the question of the vessel's seaworthiness was first agitated, a very strong opinion based upon the duration of her pumping. "If the Alert." he said, "should, at sea, on her present voyage, use one pump for five minutes, every four hours, in bad weather only, with a heavy sea, as is most common for deeply laden ships to do in such weather' in such a case I consider she would have been seaworthy when she But if she required more pumping, she must have been then unseaworthy. Any need of two pumps except in a hurricane on her present voyage, or the need of a long spell of, say, half an hour or more with one pump every four hours, I look upon as quite conclusive of her unseaworthiness when she sailed ... I have never passed a ship before as a good risk which I knew would require a short spell every four hours at the pumps at sea, and I would not have passed the Alert as a good risk, if I had thought she would require such pumping." These earlier views of Captain Shepherd certainly are very strong against the seaworthiness of the vessel; and though he has since, and probably with justice, modified them I cannot but think that his general experience and his long acquaintance with the ship give them some weight. What conclusion, then is to be drawn from the pumping in the harbour? Captain Shepherd said at the trial that he would infer unseaworthiness if the Alert was pumped four times in the harbour, but that he would not come

to the same conclusion from her being pumped three times. If, then, it has been established by Captain Laycock and Abdul Kadir that the Alert was pumped four times, and for half an hour each time the ship is condemned by Captain Shepherd. But all the other witnesses would condemn her even if she were pumped less frequently. Even Capt. Chase, who has commanded no less than three vessels with steady leaks of from one to two inches an hour, and whose "standing order" it is ever since he has commanded a ship, to try the pumps, when at sea, every two hours, without reference to the state of the weather, said that in harbour it was his practice to pump only twice a day, morning and evening. It is evident that the vessels which he commanded have not been in general first class vessels; and if a man of his prudent habits did not pump his ships more than twice a day in harbour, I think that he would strongly doubt whether any vessel was seaworthy for a voyage across the Bay of Bengal, which needed pumping three times a day in harbour. Captain Laycock, when asked whother a ship could be seaworthy which was pumped so often under such circumstances, declined to express any positive opinion; but when asked how he could account for a seaworthy vessel pumping so often. his only suggestion was that water might have been poured into her to keep her sweet. Capt. Laycock was examined under a commission, and this point was not further pressed upon him; but as his evidence stands, it would seem that he considered that unless water was poured into her, no seaworthy vessel could need three pumpings a day in harbour. Capt. Eaglesham said that no good ship would require more frequent pumping in harbour than once in the morning and one in the evening; and that any vessel which pumped three times a day for half an hour at a time in harbour was unseaworthy. So, Capt. Wright said that if a vessel, after being repaired, required three or four times pumping daily, he would think that there was something wrong with her. In short in the opinion of all the most competent seafaring men, examined masters of vessels and professional surveyors, the Alert was not in a seaworthy condition if she was leaking as she was last August, in this harbour.

Upon the whole, then it seems to me that the Alert struck on a sand-bank off Malacca, and then received an injury which caused the subsequent leaking. I believe that that leaking was not cured either by the repairs at Rangoon or by the subsequent repairs here. Indeed, when I bear in mind that the hole which was repaired here was covered with felt, with a sheathing plank  $\frac{1}{2}$  or  $\frac{3}{4}$  inch thick, and with a sheet of copper, I cannot believe that any water would have ever made its way into it, if the fastenings had not been started. I

believe, further, that the Alert leaked in the harbour of Penang down to and at the beginning of her voyage to Madras and Nagore to the extent, as I have said, of being pumped three, or more probably four times a day, for half an hour at a time; and I gather from the evidence of several professional and skilled witnesses whose opinions have not been questioned, that a vessel so leaking is not in a seaworthy condition for a voyage across the Bay of Bengal. I therefore hold, in accordance with their opinion, that the Alert was not seaworthy at the beginning of the voyage in respect of which the Policy was given.

Judgment for the defendant. .

# >>>>> INDIA.

April 16, 1863.

BEFORE MR. JUSTICE MORGAN

May Pickford & Co. vs. The Bengal Marine Insurance Society.

The Advocate General and Mr. Paul for the plaintiffs.

Mr. Bell and Mr. Reed for the defendants.

This action was instituted for the recovery of the amount of a certain Policy of Insurance granted by the defendants to the plaintiffs on freight of the Alert, from Penang to Nagore. The ship, with the goods, was lost near Cuddalore on the 6th of October 1861. The point substantially in issue was the seaworthiness of the vessel on her departure from Penang.

The plaintiffs rested their case on the certificate of Captain Shepherd, Lloyd's Surveyor at Penang, the evidence of the chief-mate of the vessel that the vessel was sea-worthy and pumped only once in twenty-four hours in harbour, the fact that the vessel had crossed the Bay of Bengal in bad weather, and the Insurance Companies in England having adjusted their Policies on the block

The defendants stated that they were ready to pay if they were really liable that they wished the case to be tried only on its merits, and would take no technical objections; that had they adjusted the Policy with the evidence they had in their possession as to the state of the vessel in Penang harbour and at the time of her leaving it, which they submitted to the plaintiffs, they would be offering a premium to fraud; and that the Insurance societies at Penang and Madras successfully resorted to law.

They then read the evidence of two witnesses which had been taken under commission at Penang, from which it appeared that the vessel on its passage from Singapore to Penang had been twice on sand-banks and had pumped much. They read the evidence of several other witnesses, also taken under commission, from which it appeared that the vessel was regularly pumped with two pumps four times every day whilst in harbour, and an hour at each time, and that one of the witnesses had shortly previous to the departure of the vessel informed the Captain that there were rumours of his barque being leaky, to which the Captain replied that he did not care as he had the Surveyor's certificate. They then read the evidence of Mr. Bain, likewise taken on commission, from which it appeared that he and the members of certain

Insurance Companies had actually written to the Captain previous to her departure, that they had been informed the vessel was leaky, and requesting him to have her surveyed; the responsibility of not doing which would rest with him. They then put into a log book kept by the same chief officer, from which it appeared that the vessel was regularly pumped every 4 hours in the day in harbour, and that a few days after leaving harbour it was pumped all day and night, showing thereby that the evidence of the chief-mate was wholly unworthy of belief. They then read the evidence of Captain Shepherd, also taken on commission, from which it appeared that his certificate was given chiefly on the representations of the Captain of the vessel, and that he had suppressed the following addition in his certificates to the Insurance Companies, but which were contained in that given to the Captain: "But strongly advise her being docked and new metalled as early as possible after the present voyage."

They then put into the box Captain Laycock, who was in Penang harbour at the same time with the Alert, and he fully corroborated the evidence taken on commission as to the number of times the vessel was pumped in harbour. This witness, as well as Captain Thomas Hill and Captain William Durham, gave their opinion as experts that a ship in the state in which the Alert was described to be would be unseaworthy. After the Counsel for the defence replied, and before he went into the evidence, the learned Judge asked the learned Advocate General whether he thought his position sufficiently strong to proceed with the case; and on his stating that they had Capt. Shepherd's report in their favour, the Judge said if he had a strong opinion on the case, he might proceed.

The Advocate General, after consulting with his clients, replied that he had no instructions to stop the case.

Mr. Justice Morgan-Even if the defendants' case was weaker than it is. I would have felt disposed to decide against the plaintiffs; for of the only evidence produced by them, little or no reliance can be placed on that of the chief officer, as the entries in the log-book kept by himself are utterly contradictory of his statements, and with regard to the certificate of Captain Shepherd, it cannot be depended on, for it is evidence that he performed his duties in a negligent and careless manner and did not himself see that the repairs were satisfactorily done or were sufficient. On the other hand, the defendants have produced a mass of strong and independent testimony to prove the leaky state of the Alert before she left Penang. The case does not wholly depend on the quantity of water the vessel was making as deposed to by the defendants' witnesses. The evidence of the plaintiffs themselves shows that the vessel was not in a satisfactory state, and considering the use which was made of the certificate by the Captain when he was informed of the reports as to the leaky state of the vessel, I have no doubt as to the character of the representation made by him as to the state of the vessel. I believe the evidence of the witnesses as to the bumping of the ship, which fully accounts for the pumping which was such as to attract the attention of Captain Laycock, who had no interest in the matter, and for the vessel's requiring to be pumped four times a day while in harbour, and day and night a week after leaving harbour. Taking the whole of the evidence into consideration. I find the Alert was in a leaky and dangerous state before leaving Penang, and on the opinion on it of the three experienced experts that she was unseaworthy, I find therefore for the defendants on the issue as to seaworthiness. - Englishman, April 10.

# 7th October 1862. Before Sir P. B. MAXWELL—Recorder. Syed Noor and another v. Green.

In an agreement where plaintiff undertook to build a house for defendant for a specified sum and received an advance before the work is commenced but afterwards broke the contract owing to defendant's refusal to make further advances. An action could not be maintained upon the contract—Plaintiff sued Defendant for what he is entitled to, the Court assumed that from the act of the defendant in the transaction a promise to pay was to be inferred, and allowed the plaintiff only his actual claim.

The facts of this case appear sufficiently from the judgment, Mr. Aithen appeared for the plaintiffs; the defendant appeared in person.

THE JUDGE-In this case the plaintiffs sue the defendant for goods sold and delivered, and for work and labour; and the action arises out of these circumstances. Last January, by a contract in writing, the plaintiffs undertook to build a house for the defendant within two months, for the sum of 750 dollars, of which 300 were to be paid down in advance, 200 when the house was roofed, and the balance when it was completed. The 300 dollars were paid, and the plaintiffs commenced the house; but they broke their contract, abandoning the work in March, and not returning to it "after repeated notices. They said that this was owing to the refusal of , the defendant to make them further advances; but he was not bound to make any, as the house was not roofed. Indeed, the walls of the upper storey had not yet been constructed. it was not disputed that the plaintiffs had not performed their contract; but they sued not upon the contract, but upon a quantum meruit, that is, to recover what they deserved; and this they are entitled to claim, under certain circumstances. The general rule is that when the consideration for a promise on one side, is the previous performance of another promise on the other,-for example, where, as in the present case, the consideration for a promise to pay a sum of money is the performance of a promise to build a house—the latter promise must be performed before the former can be sued upon; and in this case therefore no action could have been maintained against the defendant under the contract. there are contingencies in which an action may be maintained though the contract has not been performed by the plaintiffs; as where the other party has refused to perform his part, or has incapacitated himself from performing it; or has prevented the other

side from performing his part; or has accepted some benefit from what has been done by the other side, in partial performance of the incompleted contract under such circumstances that it would be unjust if he did not pay for it. In the former cases, the party not in default may, if he likes, rescind the contract, and sue for compensation for what he has done under it; in the latter, the party in default may sue for compensation for the benefit which the other side has derived from what has been done, the law implying a promise by the latter to pay for that benefit what it is reasonably worth. This case falls within the latter category. After the plaintiffs had declined to proceed with the building, the defendant resumed possession of his premises, including not only the partially built structure, but also the timber and other materials which had been carried there by the plaintiffs for the building; and the question now is, what is he to pay for the benefit which he has derived therefrom. The plaintiffs cl im to be paid the price of all the materials and of all the work and labour done; and for the materials and work and labour they demand 725 dollars, or within 25 dollars of the sum for which they contracted to build the whole house. On the other hand, the defendant has produced evidence to show that the value of the materials has been greatly overstated, and that a part of the work and labour was wholly useless to him. On taking possession, the defendant sent for a Chinese builder, who, with a carpenter and a bricklayer, examined the work done and the materials; and I may state here, at once, that I place much more confidence in the evidence of these men than in that of the plaintiff-. not only because I do not find that they have any interest or other motive for understating, as the plaintiffs obviously have for exaggerating, but also because it seems to me very unlikely that the real value of the materials of the house and of the labour of raising it to the first floor, should amount to within a few dollars of the whole contract price. I have to observe, also, that the plaintiffs, did not call a single person whom they employed, or from whom they bought the materials; while the defendant has shewn from the evidence of the brick seller, not only that the quantity of bricks sworn to by the plaintiff, Syed Noor, was greater than that supplied, that is, 76,000 and not 90,000, but also that Syed Noor had 'urged him to state that the latter was the quantity. I have no doubt, therefore, that I do not err in preferring the valuation of the Chinese witnesses to the figures of Syed Noor. The result of the evidence of the former is that the value of the materials, exclusive of the walls and of the bricks and morter composing them, was \$188-80; and as these materials were taken by the defendant, and

were used in building his new house, he is clearly bound to pay their just value, that is, the sum just mentioned. With respect to the walls, the case is different. They were found cracked in many places, and wholly unfit for the purpose for which they were intended. This was attributed partly to the insufficiency of the foundations, which were only seven, or according to other evidence, 10 inches, instead of 2 feet, and partly to the deficiency of lime in the mortar. It was necessary to throw down these walls, and this was done accordingly, and about 50,000 of the bricks were found available for the new walls which were built in their place. The rest of the building, as a matter of course, was necessarily taken down also; I mean, the beams and joists which had been laid on them for the upper storey. Under these circumstances, the defendant derived no benefit from the walls, and it he had suffered them to stand and made no use of them, I should have considered that from his simply resuming the possession of his property after the plaintiffs had broken their contract, no promise to pay for the walls could be iminlied, although the walls became his property by virtue of the rule puicquid plantatur solo solo cedit. For it must be remembered that not only is a party to a contract liable only to the extent of the benefit that he has derived from the partly performed contract, but even then, only where a promise to pay is reasonably to be implied from the circumstances. For instance, in the recent case of Munro v. Butt 8, E. & Bl. 738, a contract to do certain work on houses of the defendant not having been duly performed, the defendant took possession of the houses, and in consequence was in the enjoyment of what had been done on them under the contract: but it was held that the mere fact of taking possession of his own property was not enough to raise an implied promise on the part of the defendant to pay for the work done. Here, indeed, the defendant threw down the walls, and used such of the bricks as were available for the purpose in building his new wall; but assuming that from this act a promise to pay was to be inferred, which I do not assert, it seems to me that it could be only a promise to pay for the bricks used, after deducting the cost of adapting them for building, that is, the expense of throwing down the walls: for that is the extent of the benefit derived. This would be 110 dollars ( 120, the price of 50,000 bricks, minus 10 dollars the cost of taking down the walls ). But this, with the other sum which, as I have said, the plaintiffs are entitled to recover, (\$188.80) is more than covered by the defendant's payment. There will therefore be judgment for the defendant.

# 19th September 1862. Before Sir P. B. Maxwell,—Recorder.

Reg. v. Song Sam.

The words "found therein" in the gambling Act, applies to a person who is arrested some distance from the place of gambling, if he is seen going out of such place. The proceedings by certiorari do not come within the 29th Section of Act 48 of 1860 as those words apply only to proceedings "against any person" and refer only to a criminal proceeding. The Police have no authority to search and seize moneys found in a house where gambling is carried on otherwise than the moneys found in the room or place where the gambling was carried on. Accordingly where all the money in the house was seized by the Police and the Magistrate ordered the same to be forfeited, the Court quashed the order. The words "reasonably suspected to have been used or intended to be used," mean such money only as appeared to have been used or to have been destined to be used for gaming then and there at the sitting, i.e., not money which might afterwards be intended, but which had then and there been intended.

On the 17th of April last, Mr. Plunket, the Deputy Commissioner of Police, issued a warrant to an Inspector, to enter a house in Beach Street, No. 82, under the 58th Section of the Police Act. The information upon which the warrant was issued had been laid before the Commissioner of Police. The Inspector, accompanied by several Policemen and also by the Deputy Commissioner, passed through the adjoining house, No. 81, and got to the rear of 82. As they approached, the alarm was given, and a number of persons, including the defendant, ran out of a room at the end of the building, next to the seabeach. The Police officers immediately entered the room, and found there cards dice and dollars, lying on a mat, such as is commonly used by the Chinese for play. The defendant was arrested near the beach, about fifty yards from this He and seven others who were captured, were searched, and money was found on them to the amount of 136 dollars. officers then passed from this room, by a passage of about 150 feet in length, to the front shop facing Beach Street. There they found a wooden and an iron chest. The key of the former was in the possession of the defendant; and he delivered it to the Deputy Commissioner, who opened the chest and found eleven bags, containing respectively 200, 10, 47, 3, 87, 10, 88, 3, 88, 3, 44, 4, 56, 3, 56, 3, 84, 12, and 21 dollars and cents, three other bags containing each about 80 dollars in copper, some paper bundles containing about 6 dollars, and three baskets containing respectively 5, 06, 10, and 51 dollars, and 106 rupces. The iron box was opened also and in it were found 479 dollars in silver and 100 in notes. From the front shop the Police proceeded to search the rooms upstairs; they found some boxes there, which they broke open. In three they found small sums amounting altogether \$19. All these sums of money amounting to upwards of 1,300 dollars, were carried, with the defendant and a number of other prisoners, before the Magistrate, who on the 16th of May convicted the defendant of having been found in a gaming house for the purpose of gaming there, and fined him 200 rupees. On the 28th of May, he made an order that all the money found in the house should be forfeited.

On the 5th of September, upwards of three months after the order, a rule was applied for by Mr. Campion for a certiorari to remove these proceedings into this Court with the view of their being He contended that the Deputy Commissioner had not any power to issue the warrant, or at all events not on an information laid before the Commissioner, and that this vitiated the whole proceeding. He objected further, (1st ) to the conviction, that there was no evidence to support it, as it appeared on the depositions that the man was arrested at some distance from the room. and consequently that he had not been " found therein;" and ( 2ndly ) to the order, that the money found in the front shop and bed rooms was not liable to forfeiture. The Judge held that whether the warrant was good or not, the conviction was right, for there was no evidence that the house was a gaming house, and that the defendant was found there for the purpose of gaming. There was an information before the Commissioner of Police, and gaming implements, were found in the house informed against; and these two circumstances, the information and the discovery of gaming instruments were made evidence, by the 59th section of the Police Act, till the contrary was proved, that the house was a gaming house. Then, as to the defendant not having been " found therein," the Judge adverted to the deposition of Mr. Plunket, who stated that he had seen the defendant run out of the room, and he held that this was sufficiently a being "found" in it, though he had escaped for a moment and had not been actually apprehended there. The rule, however, to return the order of forfeiture was granted.

On a subsequent day, Mr. Aithen on behalf of Captain Smart the Magistrate, shewed cause against that rule. He objected that the application was too late, contending that the defendant was barred by the 29th sect. of Act 48 of 1860, (the Police Amendment Act,) which limits to three months all actions and prosecutions against persons, for anything done under the Police Act. This was to "pro-

secution" against the Magistrate, who was liable to the costs; and he cited the 4 & 5 Wm. & Mary c. 11; R. v. Teal, 13 East 4; R. v. Battams, 18 East 29; and other authorities; to shew that a person suing out a writ of certiorari was styled the prosecutor. He contended also that all the money found in the gaming house might be "reasonably suspected to have been used or intended to be used for the purpose of gaming," underthe 58th sect. of the Police Act.

THE JUDGE held that the case did not fall within the 29th section. It was true, the person who sued out a writ of certiorari was styled "the prosecutor"; but it was the writ which he prosecuted, and not a person. He prosecuted the writ in the sense in which a person was said to prosecute an action or suit, that is, taking the necessary steps for advancing it and bringing it to its termination; but the word prosecution was used in a different sense in the section in question. That section did not say that all prosecutions should be begun within three months. If it had, there might have been perhaps a better foundation for Mr. Aitken's argument. What it enacted was, that all actions and prosecutions against ang person should be begun within three months. It used the word in its popular sense of a criminal proceeding. But this was clearly not a criminal proceeding against any body. Nor was it an action. The section therefore did not apply. Upon the main question, as to the validity of the order of confiscation, the Judge after examining the terms of the 58th and 60th sections of the Police Act, said that in his opinion the Magistrate had taken an entirely erroneous view of the meaning of the Act, and made the rule absolute.

Sept. 19. Mr. Campion now moved that the order, which had been returned into Court in obedience to the writ, should be quashed. Annexed to the order and depositions there was a memorandum signed by the Magistrate, stating that "being satisfied from the depositions, that the moneys found in the said house were intended to be used for the purpose of gaming, and were seized by the Police officers on reasonable suspicion of such intention; and having also personally inspected the house and satisfied himself that the whole of it is fitted up and exclusively used as a gaming house," he had made the order.

Mr. Aitken, on behalf of Capt. Smart, was heard contra.

THE JUBGE said the question was whether this order could be supported, that is, whether having regard to the true meaning of the Act of the Legislative Council under which it was made, there was any evidence whatever on the deposition to support it; or it might be put in another way, whether the Magistrate, upon the facts as they appeared on the depositions, had any jurisdiction to

make this order. If the Magistrate had jurisdiction and had any evidence before him, his order must stand, for this Court was not a Court of Appeal in the sense of rehearing cases determined by Magistrates, and deciding them upon his own view of the evidence. But on the other hand, if the Magistrate had no jurisdiction or had no evidence before him to justify his exercising it, his order must be quashed. The duty of the Superior Court was to see that the inferior Courts did not pronounce orders, judgments or convictions which they had no jurisdiction to pronounce; and they exceeded their jurisdiction either when they made an order to which the law did not authorize them to make, or, if it authorized them, when they made it in cases where there were no facts whatever to justify The Magistrate, here, had power to confiscate money found in a place used as a gaming house; and the question was whether there was any evidence before him was found under circumstances authorising its confiscation. Under the 60th sect. of the Police Act. the Magistrate had authority, upon conviction of any person for keeping a gaming house, or for being present there for the purpose of gaming, to confiscate the money and articles of value "seized therein." such as the Police authorities had lawful power to seize under the 58th sect. of the Act. That section empowered the Commiscioner of Police to give authority to the subordinate officers by warrant, to do several things. They were to enter the house, room or place informed against, by night or by day, and by force if necessary; and they were to take into custody all persons "found therein," whether or not then actually gaming, and to seize all gaming instruments, moneys and valuables "reasonably suspected" to have been used or intended to be used for the purpose of gaming which are found therein. What was meant by found therein and by reasonable suspicion? did "therein" mean the room which was the scene of the gaming operations, or did it mean the whole of the house or premises of which that room was a part? The Magistrate had put the latter construction on the words and had then "reasonably suspected" that all the money found in the front shop and the bed rooms "had been used or intended to be used for the purpose of gaming." He seemed to have considered that all moneys and valuables which were found in a gambling house, from garret to cellar, were subject to confiscation if he had reasonable ground to suspect that the owners of the money, at any time, however distant had used, or at any time, however remote, would use it for gaming purposes; and that the fact that the house was a gaming house was enough to stamp every dollar found in it with reasonable suspicion that it had been or would be staked at play. If this had been the intention of the

Legislature, it was difficult to see why they had confined the penalty of confiscation to the money found in the house, and had not involved in the same peril all the other property of the owner of the house, for all, upon such reasoning, was equally open to the same At all events, it was unnecessary to have made the forfeiture of the money dependent on the suspicions of the Magistrate, if those suspicions were to be applied thus indiscriminately to all property found in every part of the house. It would have been simpler, and it would have avoided a diversity of decisions, to say once for all, that all money and securities for money found in a common gaming house should be forfeited. Such a construction would make the Act a very sweeping and harsh measure; and suspicious having no better foundation than was afforded by the facts of the present case appeared to him to be rather conjecture, of the loosest and vaguest kind than what could be justly called a reasonable suspicion. Indeed, the Magistrate could probably have been led to doubt whether his conjecture that every farthing found in a gaining house was intended for gambling, if he had reflected that keepers of gaming houses had to eat and drink and pay house rents and servants' wages &c. But in his (the Judge's) opinion the Magistrate had wholly mistaken the meaning of the Act, and his construction of it could not be supported. That meaning seemed reasonably plain. The Legislature was dealing with two evils: (1) keeping gaming houses, and (2) playing in gaming houses. It had been found impracticable to suppress these offences by the ordinary common law; first, because it was difficult to obtain access to the places where they were committed; and secondly, because even when access was obtained, it was seldom that gaming was found actually going on, and it was next to impossible to prove that the place was a common gaming house, or who were its owners. To facilitate access. the Legislature provided that in cases of just suspicion the Police should be authorised to force their way into the suspected place. To provide proof of gaming, and of keeping a gaming house, it was declared that if any gaming instruments were found, they should be primâ facie proof that the place was a gaming house, and that those who were assembled there were there with the intention of playing. As it was in the nature of things that the Police could seldom succeed in coming so entirely unawares upon the gamblers with their cards or dice actually in their hands, and their stakes on the table, it was further provided that the persons found in such a place should be equally liable to the penalties of the Act, although they had not been surprised in the act of gaming, and that all money, &c. which could be "reasonably suspected to have been used or intended to be used" for gaming should be liable to confiscation. The Police were to enter the suspected place, and were, to throw a net over the persons, cards, dice and money found there, whether they were actually seen engaged in gaming, or whether they were found under such circumstances as would lead any reasonable man to infer having regard to the surrounding circumstances—that they were at play until disturbed by the approach of danger. The money to be taken was evidently such money only as appeared to have been used or to have been destined to be used for gaming then and there at the sitting. This seemed to him plainly what was meant by money suspected "to have been used or intended"-that, is not money which might afterwards be intended, but which had then and there been intended—"to be used for the purpose of gaming." In a word that which was the subject of forfeiture was the bank and the stakes. If the section had stopped there, he should have been prepared to put that construction upon it, as the most obvious and reasonable. But the next few words seemed to put the matter beyond reasonable doubt. The money liable to confiscation was plainly money which the Police had authority to take. If the money found in all parts of the house and on the persons of the prisoners was liable to confiscation, the Police must have authority to search for it and take it. By what authority had the Police, in this case, proceeded to search their prisoners and the rest of the house for money, and by what authority had they taken the money found on the men and in the house? The Act authorized-and the warrant neither did nor could give any greater power-the search of "all part of the house, room or place," and of the prisoners, only for one purpose, and only in one state of circumstances, viz: for gaming implements, and for them only when the officers have reason to suspect, that any are concealed. The words were, "to search all parts of the house, room or place which he shall have so entered, when he has reason to believe that any instruments of gaming are concealed therein, and also the persons of those whom he so takes into custody, and to seize and take into custody all instruments of gaming found upon such search." There the Legislature had put their own meaning on the word "therein." If the clause authorising the capture of all money &c. "found therein" had been intended to apply to every part of the premises, this last power would have been unnecessary. If it was necessary, it would be so only because by "found therein", the Legislature meant found on the spot where the gambling had been going on. It was plain, according to the maxim expressio unius est exclusio alterius,-a maxim which had been said to be never more applicable than when applied to Statutes that the Police in this case had no right to search at all or if they had a right to search, it was only to search for gaming instruments. Money they had no right to search for or take. In a word the Legislature had never contemplated the configation of any property but that which, was substantially in use at the sitting. So far from proposing to make good prize the money and valuables found in other parts of the house, because they might have been ill-gotten or be ill-destined, it had not thought it right to confiscate even the money which might be found on the persons of the gamblers, as to which conjectures might be reasonably stronger. Upon the whole, the money in question was not money which the Police had authority to seize, and not money therefore which the Magistrate had jurisdiction to forfeit. The order must be quashed.

27th, November 1862.
BEFORE SIR P. B. MAXWELL, RECORDER.
CAUNTER v. BROWN & others.

If A in compliance with an order from B, sends goods for him, but to C, A's agent, and the dealings between A and B. are on terms of credit, but A instructs C, his agent not to deliver the goods but on payment of their price, and C accordingly detains the goods from B, on which he brings an action. Held, that as A had no right to detain the goods on account of his terms with B, he could no more give C his agent the right to detain the goods as against B, who was a stranger to such instructions and whose dealings with A were on entirely different terms.

B, on C's refusal to deliver the goods wrote to him saying that if his instructions were to refuse delivery of the goods till they were paid for, he must hold them at the risk of A his principal, as he B, "disclaims all further interest in them." Held, that this letter did not amount to a disclaimer, but to a mere statement that if the goods were deliverable only on payment, they were not the goods he contracted for, and he therefore has no property in them, still less any right to the possession of them.

THE JUDGE :- This is an action of trover for two barrels of Bass' beer and a barrel of Barclay's stout; and the question in dispute between the parties is whether or not the plaintiff has a right to the possession of the goods without first paying the price of them to the defendants. The defendants are the agents of Messrs. Richardson & Co. of Cornhill, who consigned the goods to them for delivery to the plaintiff, by whom they had been ordered. With reference to the cases cited on either side, I think it enough to say that the question to be decided is governed by two or three elementary principles of law, about which there can be no dispute. One is, that when a specific ascertained chattel is bought and sold, the property in it passes at once to the purchaser by the contract and before delivery. When the subject of the contract is not ascertained, -as in the present case, where the order, was not for any particular casks of beer, but simply for so many casks of a certain kind and quality of beer,—the property vests in the purchaser not at once, that is, as soon as the contract is made, but as soon as the articles have been ascertained and appropriated specifically to the contract. But though the property passes to the purchaser it does not follow that he is entitled to the immediate possession.

This depends upon the terms of the contract. If the sale be upon the ordinary terms of payment on delivery, it is another rule that the vendor has a right to detain the goods until he is paid for them. He has in that case a lien on them for the price. But if the contract is inconsistent with his retention of that lien, as if the goods are sold upon the terms that they shall be paid for on a future day, and there is no corresponding stipulation to postpone the delivery till that day, then it is another rule that the vendor has no right to detain them, but that not only the property, but the right to the immediate possession vests at once in the purchaser. As to the property in goods consigned by a bill of lading passing by an assignment of the bill of lading, as urged by the defendants counsel, that proposition is unquestionably true; and there is no doubt that by assigning the bill of lading to the defendants, Richardson & Co. transferred all their interest in the goods to them. But Richardson & Co. transferred nothing more. In legal affect, the transfer of the bill of lading was the same thing as if they had delivered the goods manually to the defendants. They are in the same position as Richardson & Co. would have been if they had been themselves here, and were the defendants to this action. If Richardson & Co. had a right to keep possession of the goods till payment, so have the defendants. If Richardson & Co. were not so entitled, but the right to the possession passed to the plaintiff, the defendants cannot be entitled to detain them from him.

Now, with respect to the facts of the case; it appears that in reply to some communication from the plaintiff, towards the end of 1859, to Messrs. Richardson & Co., the latter wrote to him on the 10th of January 1860, mentioning the execution of an order which had been sent to them by him, and proposing that in future their mutual dealings should be conducted on the footing of "a half yearly account being rendered to you, against which you will remit to us." The same letter stated that the goods ordered had been consigned "to the care of Messers. Brown & Co.," the defendants, "who will see to their clearance." In May 1860, other goods were consigned to the defendants for the plaintiff by Richardson & Co., but the defendants refused to deliver them till payment, stating that they had received instructions to that effect from their principals. On the plaintiff shewing them Richardson & Co's. letter of January 1860, however, the defendants gave him up the articles without further insisting on payment. They appear also to have written to Richardson & Co. on this subject on the 15th of May,; for in acknowledging the receipt of a letter from them of that date, Messrs. Richardson write (June 27) "we note that you have handed over the goods valued " &c. " to Mr. Caunter without any payment on his part, in consequence of his shewing you our letter of January 10th on the subject of a half yearly account. He ought, however, to have shewn you later letters corroborating our advices to yourselves to the effect that he was to make payment to you, for which purpose the goods were consigned to you. We should explain that Mr. Caunter is a stranger to us . . . . At the time of the letter of January 10th ,our dispatches to him were but trifling, but when we found his orders increasing to sums of £50 and upwards, we deemed it prudent to consign the goods to you in the full expectation that, pursuant to our advices, you would obtain payment prior to delivery. After this reaches you, pray act on this principle until further advices to the contrary."

This letter, it is obvious, did not alter the terms of the arrangement between the plaintiff and Richardson and Co., and the former has denied on oath that he ever received any such letters as mentioned on the subject of payment on or prior to delivery. It does not refer to any specific letter, nor it does quote any

passage from any letter of their own or of the plaintiff, to shew their agents that the terms of January had been altered; and I cannot but think that the real truth is that the instructions to demand payment were given, not because Richardson & Co. were entitled to it under the terms of their contract with the plaintiff, but merely because, as they say themselves, "they deemed it prudent to consign the goods to Brown and Co. in the expectation that they would obtain payment prior to delivery." I come to this conclusion partly because I have the plaintiff's oath that no alteration in the terms of the original bargain was made, and partly because, after having read all the letters and papers which were put in, I have been unable to find any evidence or trace of dealings upon an altered footing. It is true, on the 14th of October 1860, there is a letter from Richardson and Co. enclosing a statement of account down to the 30th of June, in which they say, "we would beg to remind you of your promise to remit to us upon receipt of the goods supplied," and requesting a draft on London, or payment to the defendants; but according to the plaintiff there never was any such promise. Again, a new days later (October 26th) they write to him: "by the Southampton portion of the mail we sent you our statement of account and reminded you of the original proposal that you should remit the amount of each consignment of goods on receipt of them. The departure from this has been the subject of some correspondence between us and Messrs. Brown & Co., and we refer to this as we observe that you have been looking for accounts from us; whereas every Invoice furnishes of itself an acount pro tanto. against which we had anticipated remittances." If these passages are to be understood as representing Messrs. Richardson & Co's. recollection of the original proposal, it shows that their memory was in error, for the original proposal was, not that the amount of each consignment should be remitted on receipt of them, but that an account should be rendered half yearly, and that the plaintiff should draw against it; that is, should remit the amount of each account on receipt of the account. If they are to be taken as a proposal that the original terms should be modified, there is no evidence that the plaintiff assented to it either expressly, or by adapting his subsequent dealings to it. All the evidence is the other way. Two accounts furnished by Richardson & Co. to the plaintiff are in evidence, one from January to the 30th June 1861, and another for the corresponding period in the following year, both stating in the engraved heading "terms, discount for cash, interest after 12 months credit on half annual accounts, 5 per cent."; and both beginning with stating the balance of the account rendered up to the previous 31st of December. In April 1861, Richardson & Co. write to the plaintiff notifying the dispatch of goods specified in an Invoice annexed, but they do not ask for payment, or otherwise shew that they are dealing with the plaintiff on the footing of the letters of October 1860: and on the 29th September 1861, they send him a statement of account down to 30th of the previous June, and request "the favour of an early remittance for the amount, and the continuance of your esteemed favours". The last letter ever written to Mr. Caunter by Richardson & Company, in September last, to which I shall have to refer presently, is substantially to the same effect. there is the fact-that during all the dealings between the parties, the plaintiff never did nav for goods on delivery, and, as far as there is evidence before me on the point, that Richardson & Co. demanded remittances not when advising the despatch of goods, but on handing their half yearly accounts. Upon the whole, then, the conclusion to which I come, notwithstanding the letters of October 1860 and the letter to their agents of June 27, is that the dealings between the

plaintiff and Richardson & Co. continued to be regulated by the terms of the letter of January 1860, or to speak with more precision, that the goods which were from time to time sold and delivered by the latter to the plaintiff, were sold upon the terms that they should be paid for, not upon delivery, but upon receipt by the plaintiff of Messrs. Richardson's account for them, which was to be furnished half-yearly, and that payment was to be made by a remittance to the vendors in London. It may perhaps have been a further term, also,—having regard to the headings of the accounts—that the plaintiff should be entitled to discount if he paid on delivery, and that Richardson & Co. should be entitled to interest if he failed to pay within 12 months. I observe that the latter claim interest in their last account.

It was suggested by the defendants in the course of the case that the plaintiff did not punctually perform his part of the contract—that he did not remit punctually or enough to cover the half yearly account. But I do not think this material. If the plaintiff made default in payment, it might be a very good reason for inducing Messrs Richardson to refuse to deal with him on the terms of credit; and on receiving his order for the goods in question they might well have declined to execute it upon the footing of the old arrangement. But the question here is not whether they were justified as a matter of prudence, in so acting, but whether in point of fact they did so act, or whether they did not; as the plaintiff contends, act upon the old footing, and whether the goods now sued for were not sent in execution of his order upon that footing. If this he the true view of the case, Messrs. Richardson can have no right to exercise the species of stoppage in transitu which they have attempted.

It appears that in January 1862, the plaintiff ordered of Richardson & Co. two casks of ale and one of porter; and on the 10th of June Richardson & Co. wrote advising him that the goods' specified in the Invoice annexed-the goods in question in this action— had been forwarded by the Juventa, consigned to the care of Messrs. Brown & Co. and trusting that they would reach him at an early date. The heading of the Invoice is the same as that of the half yearly accounts, except that a pen has been drawn through those words which I have mentioned as to discount and interest; but Richardson & Co. neither demand payment, nor state that the goods are sent upon the terms of payment on delivery, or any other terms whatever. The Juventa, arrived here in the course of September, and the defendants, acting upon their instructions already mentioned; and also upon a letter from their principals, dated the 26th June 1862, directing them "on delivery to receive the price," refused to deliver the beer and porter except upon payment. The plaintiff in answer to this demand wrote to the defendants that he could not comply with it, "as to do so would be contrary to the conditions on which Messrs. R. & Co.agreed to do business with him." He then went on to say: "If Messrs. Richardson's instructions to Messrs Brown & Co. are such as to compel them to refuse delivery of the goods fill they are paid for, they must remain with Messrs. Brown & Co. at the risk of Messrs. Richardson & Co., as Mr. Caunter disclaims all further interest in them." This was on the 24th of September. On the 3rd of October, however his Solicitor wrote to the defendants claiming the goods under the terms of the letter of January 10th 1860; but the reply was that they could be delivered only upon payment, and that besides the plaintiff had disclaimed all further interest in the goods. However, a few days later, the plaintiff received a letter from Messrs. Richardson dated the 3rd of September 1862, enclosing a statement of account to the 30th of June adding simply: "in submitting the same

for your approval and kind consideration, we would request the favour of an early remittance for the amount, which with the continuance of your esteemed favours, will greatly oblige "&c. The account included the articles in question, and charged interest down to the end of December next. Upon receipt of this letter the plaintiff again asked for the goods and was again refused them, upon which he brought the present action.

The question now is, what is the legal effect of all these facts. on which the plaintiff and Richardson & Co. agreed to deal were, that the latter should supply the plaintiff with goods and furnish him with an account half yearly, and that he, on receipt of every such account, should remit to them the amount. As I have already said, there is no evidence that those terms were ever altered, and I think that the letters of June and September 1862, are strong evidence that the goods in question were supplied on the original terms The order for the goods was sent upon those terms; the goods sued for were set apart and specifically appropriated by Richardson & Co. for the plaintiff, as appears by the letter of the 10th of June; and Richardson & Co. neither demand payment nor claim no lien for the unpaid purchase money. The effect of the order of January and the letter of June 10, then I apprehend was this: the plaintiff said, "send me beer within a reasonable time from the receipt of this order, to be paid for when I shall receive your account for the current half year"; and Richardson & Co. answered, "we have sent you certain specific casks upon those terms". In such a state of things, not only the property in the casks but the right to the possession of them vested at once in the plaintiff.

The case, however, has been somewhat complicated by the instructions sent to the defendants by Richardson & Co., directing them to deliver the goods only on payment. Reading the letter of June 10th by the light of those instructions it might be contended that the letter was not a compliance with the plaintiff's order, but simply a notification that goods corresponding to those ordered had been forwarded, the terms for the purchase of which would be communicated by the defendants. The effect of the instructions and of the letter of June 10th might have been that, whether bound or not by the terms of January 1860, Richardson & Co. refused to execute the plaintiff's order on those terms, but they sent to Penang goods answering the description ordered, not in execution of the order, but to be tendered to the plaintiff if he would take them on the terms of payment before delivery, it is not necessary however, to express any opinion whether this would have been the just view of the case, if the letter of June 10th had been the only letter to the plaintiff on the subject, for whatever doubts. might have existed are removed, it seems to me, by the letter of the 3rd of September. For it appears from that letter that the casks which had been specified by, the letter of June 10th and sent to the defendants, were sent in compliance with the terms of the order—the terms of January 1860. Not only it makes no reference to the instructions to the defendants, and set up no lien for the purchase money, but it is inconsistent with those instructions, and with the existence of any lien. It assumes that the goods have been delivered, and that they have not been paid for. The instructions to the defendants are, "receive payment on delivery;" while the letter of September says, "send an early remittance to us, Richardson & Co." I have no doubt, therefore, that the beer was sent upon the terms of the letter of January 1860, and that when the casks were appropriated to the execution of the order, not only the property but the right to the possession passed to him. The instructions to Messrs Brown & Co. are no doubt at variance with this view of the plaintiff's rights; but they are

not altogether irreconcilable with it. Richardson & Co. seem to have been desirous to continue on terms of correspondence with the plaintiff, but at the same time to protect themselves against loss. They, therefore, to avoid the risk of giving offence wrote to the plaintiff in effect, that they sent him the goods on credit, but at the same time they gave private instructions to their agents to obtain immediate payment. The plaintiff has insisted on his agreement; the defendants have obeyed their orders; and the present action has been the consequence.

There remains one point which was urged on behalf of the defendants. It was said that the plaintiff could not now sue for the goods, since he had expressly disclaimed all interest in them. But I do not understand the plaintiff's letter in which he uses these expressions, as a refusal to accept goods which have been appropriated by Richardson & Co. to the execution of the contract between him and them, or as an attempt to rescind the contract. It seems to me to mean merely, non hac in fordera reni, if the goods in your hands are deliverable only on payment, they are not the goods for which I contracted, and I have no property in them, still less any right to the possession of them. When that letter was written, the plaintiff had already received, it is true, the letter of June, informing him that the specific goods had been forwarded to him; but still if they had been forwarded on terms different from those of his bargain, he was entitled to repudiate such terms, and to decline to receive the goods upon such terms. But he had not then received the letter of September, enclosing the half yearly account and asking for a remittance. That letter shewed that the goods had been sent according to the terms of his contract; and he was bound to take the articles if they corresponded to what he had ordered. In a word I think that the plaintiff's letter of September 24th was not a refusal to perform his contract or to take goods supplied in pursuance of it, but a repudiation of a contract into which he had not entered and which was being forced upon him in substitution of that into which he had, and a disclaimer of goods tendered upon other terms than those on which he had agreed to buy them. I see nothing, therefore, in that letter affecting his right to maintain the present action.

Upon the whole, then, I think that the plaintiff is entitted to have the goods delivered to him. He ordered them on terms of credit; they were specifically set apart for him by Richardson & Co, and were sent upon those terms. After this they could not, themselves, have withheld the goods from the plaintiff, and they cannot give their agents a more extensive authority than they possessed themselves. If they had, at the last moment, when handing their half yearly account claimed to detain the undelivered goods as the price had then become payable, it might have been a question whether they were not entitled to such a lien. But they made no such claim; the claim which they made through their agents was payment before delivery and before furnishing the half yearly account, while in applying personally to the plaintiff all that they asked was the favour of an early remittance.

-000000000

Judgment for the plaintiff

## January 19, 1863.

# BEFORE SIR P. B. MAXWELL, RECORDER

Song Sam r. The Municipal Commissioners of P. W. Island

AND

Li Chiang and another v. The same.

The Police have no authority to search and seize moneys, found in a house where gambling is carried on otherwise than the moneys found in the room or place where the gambling was carried on.

In an action for money had and received, it is no defence to say that defendant paid away the money before he was called upon to refund it unless he received the money merely as an agent for a third party and has made such payment to that third party.

The limitations given by the Conservancy Act apply to both actions of tort and ex contractu.

The plaintiff having been fined by the Magistrate for gambling and all moneys seized in the gambling house having been ordered by the Magistrate to be forfeited and paid to the defendants the plaintiff had such order quashed, and sometime thereafter brought an action against the defendants for money had and received.

Held that the limitations given by the Conservancy Act ran from the time of the receipt of the money by the defendants and not from the time the order of the Magistrate was quashed, as the action could have been brought before the quashing of the order and the Court could have examined into the validity of such order as the Magistrate who made such order was not a party to the action.

A person is entitled to the privilege of such limitation only when the action is for anything "done or intended to be done" under the Act, and a plea simply setting up such limitation without stating that the action was "done or intended to be done" under the Act, is bad on demurrer.

SEMBLE-It would be even bad after verdict.

These two cases were tried last week. The facts are sufficiently set forth in the judgment, to render a fuller report unnecessary.

Mr. Campion appeared for the plaintiffs; and Mr. Aithen for the defendants.

The Judge.—In these actions the defendants are sued for moneys had and received to the use of the plaintiffs, and they have pleaded (1) never indebted, and (2) that the alleged causes of action did not accrue within three months. The facts proved were these:—On the night of the 17th of April last, certain Police officers entered the house No. 82 Beach street, under a gambling warrant, and found gambling going on in a room or building situated at the rear of the premises. They took into custody the persons found gaming, and also seized the gaming implements and the moneys found on the spot. After this capture, the Deputy Commissioner took the plaintiff Song Sam, who was one of the persons apprehended, through the court-yard of the house and along a passage, to the front shop, about a hundred yards from the place where the gambling had been going on, and finding a wooden box there, as-

ked whose it was. Song Sam said it was his; he produced the key of it, and on being opened, it was found to contain 628 dollars and some cents, in silver and copper. There was an iron chest in the same room, which the plaintiff Li Chiang says was his, and contained his and his co-plaintiff's money. Neither of these men were in the house when the Police officers entered, or during their visit; but the iron chest was carried away and subsequently opened, when 613 dollars were found in it. Song Sam and others were convicted of having been found in a gaming house for the purpose of gaming; and I may say here, that I consider it established, or at all events, that I shall assume for the purposes of these causes, that the house was a gaming house. On the 28th of May, the Magistrate ordered that the moneys found in the two chests should be forfeited; and they were paid over to the Secretary of the defendants on the same day, upon the terms that they should be returned to the Magistrate, if he were required to repay them. Early in June, the defendants used the dollars so paid to them in payment of a requisition made upon them by the Governor, for the pay of the Police force under sect. 28 of the same Act (a) The Magistrate's order was subsequently brought up into this Court by certiorari, and was quashed on the 19th September. I think it was sufficiently established at the trial that the money in the wooden box belonged to Song Sam, and that in the iron one to the plaintiffs in the seconduction. In a case of this kind, it is not necessary to prove title; it is enough to show that it was in their possession when it was taken; Allanson v. Atkinson 1 M. & S. 583; Oughton v. Seppings I B & A. 241. The plaintiffs having demanded of the defendants, and been refused the restoration of their moneys, they commenced these actions on the 18th of November last, and the defendants have resisted the claims on the grounds, (1) that the order of forfeiture was good and ought not to have been quashed; (2) that they paid away the money before they were called upon to refund it; and (3) that the actions have been brought too late.

As to the first defence, I am of opinion that the order of forfeiture was bad, and was properly quashed. I have now had the advantage of a second and able argument in support of the Magistrate's order; but I have not, upon a careful consideration of it, seen reason to alter the view which I took of the subject when the

<sup>(</sup>a.) Sec. 28 of Act 27 of 1856 provides that the Municipal fund is to be under the direction, management and control of the Municipal Commissioners, who are in the first instance to appropriate whatever sum the Governor may declare necessary for the Police and Magistrate's establishments, and pay it as may direct; and to apply the residue of the fund to the general purposes for which they are constituted.

order was brought up before me. On the contrary, further reflection has given me further reasons for adhering to it. The point is this: the Police have authority (b) to enter any house, room or other place suspected of being used as a gaming house, to seize all gaming implements and all moneys "found therein" which are "reasonably suspected to have been used or intended to be used for the purpose of gaming," and to search all parts of such house, room or place, as well as the persons arrested, for gaming implements; and it was contended that this authorized the Police, if they found cards or dice in one part, to search every other part of the premises for money, and to take not only the money apparently in use or destined for use, at the sitting going on when the Police entered, but also all money found in the other parts of the house, if there was rea-

(b.) The following are the material enactments upon the subject.

Sec. 56 of the Police Act 1856 empowers the Police Magistrate to fine in the sum of 500 rupees, or to imprison for three months, all persons concerned in keeping a gaming house.—(See gambling Ordinance of 1876. which repealed Ordinance 13 of 1870. The wording in Section 2 of the former Ordinance is the same as in Section 3 of the latter. The Legislature in repealing the entire Ordinance of 1870 re-enacted it with the new Sections in the amended Ordinance ... ... S. L.)

Sec. 57 empowers him to fine in the sum of 200 rupees, or to imprison for a month, all persons found in a gaming-house for the purpose of gaming. And all persons found in such a house are presumed to be there for that purpose,

if any play is going on there .- (SEE Sec. 4 of same Ordinance.)

Sec. 58 " if the Commissioner of Police, upon information on oath, and after such enquiry as he may think necessary, has reason to believe that any house, room, or place is used as a common gaming-house, he may, by his warrant, give authority to any Inspector or superior Officer of Police to enter, with such assistance as may be found necessary, by night or by day, and by force if necessary, any such house, room, or other place, and to take into custody all persons whom he finds therein, whether or not then actually gaming, and to seize all instruments of gaming, and all monies, and securities for money, and articles of value, reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein, and to search all parts of the house, room, or place which he shall have so entered, when he has reason to believe that any instruments of gaming are concealed therein, and also the persons of those whom he so takes into custody, and to seize and take possession of all instruments of gaming found upon such search."—(See Sec. 10 of same Ordinance.)

By sec. 59 the discovery of cards, dice or other gaming implements in such a suspected house, or on any person found there, is made *prima facie* evidence that the place is a gaming house, though no gaming was seen by the Police. (See Sec. 13 of same Ordinance.)

Sec. 60 enacts that on the conviction of any person under sec. 56 or 57. the instruments of gaming shall be destroyed, and the money or securities &c. seized shall be either forfeited or restored, at the discretion of the Magistrate. (See Secs 10 and 13 of same Ordinance.)

son to suspect that it had ever been used for gaming or was destined to be so used at any subsequent time. But it appeared to me upon the motion to quash the order, and it seems to me still, that this construction of the Act is altogether erroneous, partly because the power to search all other parts of the premises is limited in terms to gaining instruments, and therefore excludes a power to search for money, but partly also, and chiefly, because the construction in question would lead to manifestly unjust and absurd consequences. The money liable to confiscation is money "reasonably suspected to have been used or intended to be used for gaming," but when, where, or by whom, is not mentioned. If, as I think, the Legislature meant the scizure only of the money "then and there" in use, such particulars were not necessary, for it is clear that the only property which would be taken would be that of the guilty. The words "then and there" are not used, it is true; but that they must, in reason and common sense, be intended, seems to me hardly more doubtful than that they must be intended in the English enactment which makes it penal to enter upon land by night "for the purpose of taking or killing game," and that it is no offence to enter Blackacre with the intent of killing game elsewhere. (See Fletcher v. Calthrop 8. Q. B. 880). It was said that such a construction would defeat the object of the Act; and if I could see any where an intention on the part of the Legislature to suppress gaming houses by the novel punishment of declaring all the moneys and valuables found therein lawful prize, I should feel the weight of that objection. But I see no sech intention. The Legislature punishes the offences of keeping and of frequenting gaming houses with the usual and known punishments of fine and imprisonment; and the section which has given rise to the present question morely provides facilities for detecting offenders, and obtaining proof of their offence.

If the Legislature had intended the seizure of money used on former occasions, it would hardly have omitted to specify by whom it was to have been used, and in what place, and within what time before the seizure. But if money used at any former time is made confiscable because no time is expressly limited, the same construction must be applied equally to the Act with reference to place and person, since it is equally silent as to them. It must be read as authorising the confiscation of all moneys suspected of having been used for gaming, not only at any time, but any where and by any body. Money, therefore, lost by a former owner in lawful play would be subject to confiscation if afterwards found in a bed room in a gaming house. For instance, dollars won at a public gaming table in Quedah, where such gaming is lawful, would be liable to confisca-

tion if afterwards found in any part of a gambling house in Penang. The money which the Magistrate himself had lawfully won at whist in his own house, and which he afterwards paid away to a tradesman, it would be in his discretion to confiscate, if the room in which the man kept his money was part of a house, in another apartment of which a common gaming table was kept. This, I must take leave to say, would in my opinion, be unjust and absurd, for it would involve in equal loss, the innocent and the guilty, and nothing short of the plainest necessities of grammatical construction ought to induce a Court to adopt it. It might perhaps be objected that such cases could never arise, owing to the impossibility of ear-marking current coin, (though this would not apply to securities); but so far from any such objection being suggested, it was contended that the pieces of money found in the plaintiffs' boxes were "gambling moneys," as they were called, and had been properly condemned as such, because many of them were cut, bent, twisted and light; although it was admitted that there was not a scintilla of evidence as to when, where or by whom they had been used in gambling. In other words, I was asked to hold that the fact that a dollar found in a gaming. house was light or bent, was evidence that it had once been won at play, and that it was confiscable, whether the game was lawful or unlawful, whether it had been played here or abroad, and whether by the present or any former owner. I can but repeat that, I would not impute such an intention to the Legislature unless they expressed it in language too plain to be mistaken; and I think that the language of the Act requires no such interpretation.

A further argument might possibly be founded on the use of the words "fines and penalties" only in the 29th Sect. of Act 27 and not also "forfeiture" (c.) Money taken from an offender may be justly termed a "fine" or "penalty;" but neither term is perhaps applicable to the forfeiture of the property of a person charged with no offence, and not taken on account of any offence committed by him. But it is unnecessary to pursue this subject further. I stated at some length the view what I took of it, when I quashed the order, and I shall now only add that I adhere to the opinion which I then expressed.

This being so, the next question is whether it is any defence in law, that the money was paid away before action. Two cases were cited in support of that proposition; but I think that they fail to establish it. They merely illustrate the general rule that it is not the collector or receiver of the money, but the principal, or party

<sup>(</sup>c) By Act 27 of 1856, Sec. 29, "all-fines and penalties, and all fees and poundage levied" by the Quarter Sessions or the Magistrate, as well as the tolls of public ferries, are payable into the Municipal fund.

for whom it has been paid, who should be sue l. They would have been in point if the present actions had been brought against the Magistrate or his clerk. One of them Atlee v. Backhouse 3 M. & W. 633, was an action against the Receiver of the Excise Commissioners, to recover back money which had been paid to him in his official capacity, and which he had paid over to his principals, as it was his duty to do, before he received notice of the plaintiff's claim. In the other, Horsfall v. Handley, 8 Taunt, 136, the money had been received by the defendant as churchwarden, and had been handed by him, in pursuance of his duty and also without notice, to the trustees of a chapel. In both cases, the defendants were mere agents or receivers. The money never became their property. nothing to do with it, except to receive it for their principals and to pay it over to them; it passed from their hands in the same character as it came to them. But the Municipal Commissioners did not receive this money as mere agents. It was paid into their Municipal fund, and applied by them as they might have applied any other part of their property. It is true, they are bound by law to dispose of their fund for certain public purposes; among others, for the purpose for which they employed these particular moneys, that is, in payment of the sum which the Governor deems requisite for the Police force; but that obligation does not make the Municipal fund the property of those who have claims upon them, and the Commissioners the mere treasurers of it for them; any more than the obligation which the law imposes on a debtor to pay his debts, makes him a trustee of any part of his property, for his creditors. The defence, therefore, when the facts are examined, is not that they received the money as mere collectors, and that they have paid them over to the parties entitled; but, that they have spent the money as a part of their own funds, in the discharge of their legal obligations. But this is no defence in law, any more than it would be in reason and justice. (a)

The second plea sets up the Statute of Limitations. The 32nd Section of Act 25 of 1856 provides that actions against the Commissioners for any thing done or intended to be done under the powers of that Act or of Act 27, shall be brought within three months from the accrual of the cause of action. The present action was brought on the 18th of November, more than three months after the money was received by the defendants, but less than three months after the Magistrate's order was quashed; and two questions were raised on

<sup>(</sup>a) Snowdon vs. Davis 1 Taunt, 359, Parker vs. Bristol and Exeter R. C. 6 Exch. 702. 707., Brooms Legal Maxims (3rd ed.) p. 253., and Holland vs. Russell 30 L. J. Q B. (N. S.) 308.

this part of this case. It was contended on behalf of the plaintiffs that the clause in question applied only to actions of tort, and not to actions ex contractu, which these are. But, as I intimated at the time, there are many authorities against that proposition. See for instance Kent v. The Great Western Railway Co. 3 C. B. 714, and The Kennet and Avon Canal Navigation v. The Great Western Railway Co. 7 C. B. 824. The dictum to the contrary of Grose J. in Irviny v. Wilson 4 T. R. 435 was overruled in Greenway v. Hard 4 T. R. 553, which was followed afterwards in Waterhouse v. Keen B. & C. 200, and I consider it established that the enactment applies to action ex contractu, where, as here a tort is substantially the subject matter of complaint. It was then contended that the cause of action arose only when the order was quashed, and Mr. Campion cited Collins v. Rose 5 M. and W. 194 and passages in Mr. Addison's book on Torts, in support of this proposition. But those authorities have in my opinion no application to the question. They only establish that where there is a continuing wrongful act, as a false imprisonment, the party doing it is liable from the time of its final completion. (a) But here there was no continuing wrongful It was said that no action could have been brought till the order was quashed, but I am not of that opinion. If, indeed, the action had been against the Magistrate, and the order had been good on the face of it, it would be fatal to the plaintiffs, because its validity would not have been examinable, owing to the general rule that a matter of. fact adjudicated by a judicial officer cannot be put in issue in an action against him; Brittain v. Kinnaird 1 B. and B. 482, and Kemp v. Neville 31 LJ. CP. 158. (b) But in an action against any other person, as for instance against the present defendants, the validity of the order would have been examinable, and if the order had been set up in an action against them, the plaintiff would have been entitled to judgment on shewing that it was invalid. It seems to me, then, that the cause of action arose when the money was received by the defendants. It became at that time money had and received by them to the use of the plaintiffs, and the time is computable from that period.

But two other questions occurred to me with reference to this plea. I have had some doubt as to whether the cause of action was "anything done or intended to be done" under the Act, having regard to the circumstances under which the money was received by the defendants. It was delivered to them not as "a fine or penalty," or as

<sup>• (</sup>a) See Sandilands Buttery & Co. vs. | The Municipal Commissioners of Penang tried on 24th April 1872. (b) See Crepps vs. Durden Cowp. 640. S. C. Sm. L. C. 666 (6th ed) and Gilding vs. Syde LJ. CP. 174.

"a fee or poundage" levied by the Magistrate, but as a "forfeiture;" it was received also, not simply for the ordinary purposes of the Conservancy Acts, but upon the special condition of being returned to the Magistrate in the event of his being required to refund it; and I think it clear that the defendants, through their officer, had notice of all the circumstances connected with the confiscation. However, it is not necessary to express any opinion on this point, for it seems to me that the plea does not raise the question, and that consequently it is no answer to the action. The plea says only that the cause of action did not accrue within three months, but this is no defence according to the general law of the land. The defendants are entitled to the privilege of that short prescription, only when the action is for anything done or intended to be done under the Act, but the plea does not allege that the causes of action in these cases were something done or intended under the Act. And this omission is in my opinion, fatal upon the authority of Garton v. The Great Western R. Co. 28 LJ QB 321. That was an action for money had and received; and it was brought to recover excessive charges made for carrying goods. The defendants pleaded that they had not received notice of action parsuant to their Act of Parliament which entitled them to notice where the action was for something done in pursuance of the Act; and after trial and judgment in their favour on that plea, the Court of Exchequer chamber reversed the judgment on the ground that the plea did not state that the money sued for had been received in pursuance of the Act. The point is a technical one, no doubt; and if it defeated the interests of substantial justice, I should perhaps be able so to deal with it, so as to avoid that consequence; but it seems to me that in this case it will promote, instead of defeating, those interests, to give full effect to it. When the only defence to a demand which seems to me just is that it accrued more than three months ago, I do not think I am called upon to defeat the demand by giving any a sistance to that defence.

There will be judgment for the plaintiffs.

#### April 15, 1863.

### Before SIR P. BENSON MAXWELL, -Recorder.

#### Mahomed Juso v. Khu Sek Chuan.

If a lessee is in arrears of his rent and the lessor serves on him a notice to quit or to pay extra rent for the time he stays on the premises, and afterwards threatens to seize and distrain if he does not leave the premises, and the lessee in compliance with these demands voluntarily quits the premises, these circumstances will not amount to an eviction so as to entitle him to maintain an artion against the lessor for breach of covenant in a lease for quiet enjoyment; but such circumstances amount to a leave and license by the lessee to the lessor to enter on such premises which is an answer to the action.

The Judge—The petition states that the defendant demised to the plaintiff a piece of land with a house and ten shops thereon, for two years from the first of June 1861, and covenanted that the plaintiff, paying the rent and performing his covenants, should quietly enjoy the demised premises; and it alleges the plaintiff was evicted by the defendant in breach of that covenant, to his

damage of 192 dollars. Plea: the general issue.

It appears that on the 15th of March 1861 two deeds in the Malay language were executed by the plaintiff and the defendant. By one of them, the defendant demised to the plaintiff a piece of land with a house and ten shops, at the monthly rent, for the house, of two dollars, to commence from the day of the date of the deed, and for the shops, of six dollars, to begin on the 1st of June then next. The instrument provided also that if either party broke the agreement, he was to forfeit and pay 192 dollars. The shops were not, in fact, in existence at the time of this demise; but by the other deed, the plaintiff agreed to build and complete by the 1st of June 1861, the ten shops, of certain specified dimensions and materials, for the sum of 300 dollars, which the defendant covenanted to pay by instalments as the work proceeded. The plaintiff entered at once upon the land. The shops were not completed at the time fixed, and in July, without any request, but also without objection from the plaintiff, the defendant sent workmen on the premises and spent 85 dollars on the erections. On the 20th September last, the plaintiff's rent being in arrear, the defendant sent him a notice "requiring him to quit and deliver up, on the 20th of October next, the possession of the house (not the shops) with the appurtenances" which he held from the defendant; and demanding in default a rent of six dollars a month in future while he held the premises. The plaintiff did not then give up possession: on the 19th of November the defendant threatened that if he did not go out, he would "seize and distrain", and, a week later, the plaintiff left the premises, and ceased to demand the rent from the under-tenants of the shops. Thereupon the defendant entered into possession, and has ever since received the rents. The plaintiff has now brought this action, contending that the defendant evicted him from the demised premises. But it seems 'to me that there has been no eviction, and no breach of the covenant for quiet enjoyment; and that the plaintiff has failed to establish any case against the defendant. An eviction from premises is an expulsion from them. The expulsion, it is true, need not be by any actual ris major. It is enough, it has been said, if the tenant is wrongfully deprived of the use and enjoyment of the premises by any act of the landlord, which is intended to deprive him of it. Upton v. Townend 17. C. B. 30. In other words, the expulsion may be constructive as well as actual. Here

it was not pretended that there was actual expulsion, and I think' that a constructive expulsion is not to be made out from the circumstances. sist of the notice requiring the plaintiff to deliver up the premises to the defendant, the subsequent threat to distrain, and the plaintiff's withdrawal from the premises. The two former were not actually or constructively a trespass on the premises. The threat to distrain, even if the plaintiff was not then entitled, as he certainly was, to resort to that remedy for recovering the rent in arrear. would not have been such a threat as would vitiate any contract or transaction on the ground of duress. The plaintiff was not compelled to leave the premises in consequence of the demand or the threat. If he did so, then, he did it voluntarily. The demand and the threat gave him no cause of action; and a man cannot by his own voluntary act convert into a good cause of action the act of another which is per se innocent. The plaintiff did not, indeed, give the key or other symbol of possession to the landlord, but he admits, and indeed asserts, that it was in consequence of, and in compliance with the demand, that he left the premises; and that the landlord was justified, it seems to me, in so regarding his tenant's departure, and in entering upon the premises. In fact, then, there was a demand of possession on the one side, and a compliance with that demand, without protest or other expression of disapproval, on the other; and the defendant's entry under such circumstances, whatever its effect in other respects, was not, in my opinion, an eviction of the plaintiff.

There are two cases, however, which seem at first sight to support a different opinion. In one of them, Burn v. Phelps 1 Stark N. P. C. 94, the tenant underlet the premises in various lots to under-tenants; the landlord (the plaintiff) gave them all notice to quit, and one of them actually did so. In an action by the landlord against the tenant for arrears of rent. Lord Ellenbrough "was of opinion", says the report, "that the plaintiff was guilty of an eviction as to the premises occuiped by the under-tenant, and suggested that an eviction might have been pleaded to the whole demand". If the person who had left had been the tenant, or if the action had been by the under-tenant for an eviction, this case would have been an important authority for the plaintiff; but what Lord Ellenbrough decided was not that the under-tenant had been evicted, and could have maintained an action for the eviction, but that the landlord's notice, followed by the under-tenant's quitting, amounted, together to an eviction of the tenant. It was unquestionably "an act of permanent character done by the. landlord in order to deprive, and which had the effect of depriving the tenant of the use of the thing demised "(17 C. B. 72)," in the manner in which he was actually using it, and therefore constructively an expulsion of the tenant. Whether the under-tenant left voluntarily or not was immaterial; but what distinguishes that case from the present is, that there the party held to have been evicted, viz. the tenant, was not a consenting party, as he was here; and the maxim volenti non fit injuria was inapplicable. In the other case, Hall v. Burgess, 5 B. & C. 332, the tenant (from year to year) left the demised premises at the end of the current year, without having given the requisite notice to determine his tenancy, and sent the key of the house to the landlord's agent, who at first refused to accept it; but in the course of the next half year he let the premises to another person and afterwards the first tenant was sued for use and occupation for the period between his leaving the premises, and their being again let. It was held, as was manifest, that the action could not be maintained. Mr. Justice Bayley and Mr. Justice Littledale rested their decisions on the obvious ground that the rent was not apportionable, that the landlord could not have

sued for the whole half year, as he could not have averred that he had allowed. or was willing to allow the defendant to occupy during the whole of that period. But Mr. Justice Holroyd considered that the subsequent letting was an eviction of the tenant, and that such eviction might have been pleaded in bar. He did not say that the tenant could have brought an action against the landlord for the eviction, for the question did not assume that shape before him, I cannot help thinking that if it had, he would have had some difficulty in coming to the conclusion that the landlord was a trespasser after the tenant had left the premises and sent him the key. It is more probable that he would havetaken the same view as was lately taken by the Common Pleas, of circumstances very similar, in Phene v. Popplewell, 31 LJ. CP. 235. There, at the end of the current year. (the 25th of January.) the tenant ceased to occupy the premises, and on the 12th of April, he tendered the key to the landlord, who refused it; but it was left at the latter's counting house. In May, the landlord put up a board on the premiser, announcing that they were to let, and on several occasions he gave access to them to persons desiring to see them. He afterwards painted out the tenant's name from over, the door, and finally on the 20th of October took possession of the premises. The action was brought for three quarters' rent falling due on the 25th of April, the 25th of July, and the 25th of October. fendant paid into Court the rent due on the 25th of April, and the Court held that he was not liable for more, for that the deposit of the key was a continuing offer of surren der, and, that the acts of the landlord in May and subsequently, were to be considered, not as trespasses, but as an acceptance of the offer, and that, in legal effect, there was a surrender by operation of law. The two cases first referred to therefore, do not, it seems to me, apply; and I think that, but for one circumstance, the true character of the transaction in the present case would be that which was attributed to the facts in the last mentioned case. circumstance which distinguishes the present from that case is, that there the letting was not under seal, while here it is. But it is not necessary to decide whether this distinction is material, (see Smith's Landlord and Tenant p. 231, Mr. Maude's edition, and the notes to Doe v. Oliver Sm. LC.); for assuming that the principle of the decision in Thomas v. Cook 2 B. & A. 11, does not apply, and that there was no effectual surrender by operation of law, I think that there was at all events a leave and license, not revoked before action, from the plaintiff to the defendant, to enter, which is an answer to this action.

For these reasons I think that judgment must be for the defendant.

>0<>-0<

November 25, 1863.
Before Sir P. B. Maxwell, Recorder.

Dr. Farquhar r. Shellumbrum and two others.

A huffalo is not feræ naturæ but is a domestic animal. The owner of an animal mansuetæ naturæ is not liable for an injury done by it unless he knew its vicious propensities, and such knowledge must be alleged in the declaration and proved at the trial. The Court will not infer negligence on the part of a defendant by the mere happening of an accident, as that defendant's buffalo was found in plaintiff's land without a stick on its horns.

If animals ordinarily kept in confinement or control as horses, cows (but not such as are generally suffered to go at large, like dogs) trespass upon the property of another, the owner is liable for the trespass and the ordinary consequences of the trespass, and it is perfectly immaterial whether the animal escapes by reason of negligence of the owner or in spite of his most diligent care.

THE JUDGE -In this case, a buffalo said to be the property of the first and second defendants, or of one of them, broke through the bamboo hedge which separates the field in which he was kept from the land of the plaintiff, and gored the pony of the latter there so badly that it died shortly afterwards. Dr. Farquhar has brought this action to recover damages for the loss of it, and the question is whether any such action lies. His petition states that the buffalo belonged to the first and second defendants, and that it was under the care, government and direction of the third, who " so negligent's ly and improperly looked after it, as to allow it to go about unattended and without any guard upon its horns, whereby it entered the plaintiff's compound and gored his pony," &c. This statement was not supported by the evidence, for the animal was not " under the care, government and direction" of the third defendant at the time of the accident. Those words would have been applicable if the defendant had been driving the buffalo at the time, and he would have been liable if he had done it so negligently that the injury to the pony had been the consequence of his negligence, as in the class of cases of which the two referred to by Mr. Airken, Langher v. Pointer and Quarman v. Burret, are instances, though in both of them the only question in dispute was whether the relation of master and servant existed between the man who drove negligently and the party sued. Here the buffalo was fastened by a rope to a stick driven into the ground in the field where it was habitually kept, and was left grazing there by the third defendant, who then went to town.

But, rejecting as surplusage the statement as to the animal being

under the control and direction of the defendant; the question remains did the defendant "negligently and improperly allow the buffalo to go about unattended and without any guard upon its horns." No actual negligence was proved. The animal was secured at 81 A. M. in the field : the accident occurred at 101 A. M.; but how the animal got loose, whether from careles-ness in the manner of securing it, or by the mischievous act of some person, dld not appear. I was urged to infer negligence against the defendant from the fact that the animal was found on the plaintiff's land without a stick on its horns; but I think I am precluded by reason and authority from making any such presumption. "I entirely dissent,' says Erle C. J. in Hammack v. White 31 LJ. CP. 129, "from the doctrine that the mere happening of an accident throws on the defendant the onus of disproving negligence;" and the Court of Common Pleas in that case, which was an action brought by the husband of a woman who had been killed by a vicions horse ridden by the defendant, refused to infer negligence on the part of the latter from the fact that the horse had got on the foot way close to the area railings. So here, I cannot infer negligence in the defendant from the fact of the animal being in the plaintiff's grounds.

I offered, however, if it could be shown that the third defendant was guilty of any actionable negligence which entitled the plaintiff to recover damages for the loss of his pony, to allow any amendment to put the plaintiff's case in any shape to admit of his recovering such damages. I have had the advantage of hearing what could be urged in his behalf; but I am of opinion that no action is maintainable for this injury. To explain the grounds of this opinion I shall state what I understand to be the law on the subject.

Excluding cases of wilful misconduct, I believe that there are four case only in which damages are recoverable from their owners for injuries done by animals. One (to which I have already adverted), is where the animal is the immediate instrument of the carelessness of the person in whose control it is, as in the old case in Ventris, (Michael v. Allstray) where the man who rode a horse which he knew to be unruly, in Lincoln's Inn Feilds, to break him, was held liable for the injury received from it by the plaintiff; and as in the frequent cases of negligent driving. In all those cases the defendant is liable for the injuries committed by the animal for the same reason that he would be liable for carelessly steering a vessel or using a dangerous weapon. The wrongful act is in reality his own, and the animal, ship or weapon is merely the instrument by which he does it. In the same class may be included those cases

which have gone to the very verge of the law, if they have not overstepped it, where the owner, leaving his horse and eart in the street without any body to take care of them, has been held liable for injuries done by them, though caused by the immediate act of other persons, as ex. gr. Illidge v. Goodwin 5 C. & P. 190, and Lynch v. Nurdin 1 Q. B. 29, but comp. Lygo v. Newbold 9 Ex. 302; the negligence being analagous to that of leaving a dangerous implement in a place where it is probable that somebody will improperly set it in motion. The present case obviously does not fall within this class.

The second class is where the animal is feræ naturæ, or, in other words, a wild beast, like a lion, tiger, bear, or even monkey. who keeps such animals does so at his peril, and however careful he may be in securing them, he is liable for any injury which they may cause; (May v. Burdett 9 Q. B. 101,) except, perhaps, where the party injured has contributed to the injury by his own wilful act after notice of the dangerous temper of the animal. The present case does not fall within this class, for a buffalo is not a wild beast. but a domestic animal. It is used by all classes of the population for draft; and the Malays milk the cow buffalo. They are driven about the streets of the town as well as in the country, and are in general quite tractable and docile; often managed, as mentioned in the book from which Mr. Aitken read, by mere children. Undoubtedly, the buffalo is a large, powerful and sometimes a ferocious animal; but I do not understand that all buffaloes are ferocions, or even that they are generally so. I believe that all that can be said is, that some of them are sometimes so, as some bulls are at home. Magness, the Inspector of Police, in the course of his sixteen years' experience in the Police, could remember but four instances of buffaloes becoming furious and doing injury. If they were as generally savage as it was sought to establish, they could not be used as universally as they are, as beasts of draft and burden, especially in the streets of a town. Mr. Aitken referred to certain regulations made many years ago by the Justices of the Peace at Quarter Ses-, sions, requiring that a stick should be fastened on the horns of buffaloes; and he relied on them as evidence of the generally received opinion as to the dangerous nature of those animals. But though such regulations may be highly reasonable and salutary, whatever may be their legality, I do not think that they fend to establish that buffaloes are feræ naturæ, any more than a regulation to muzzle dogs in summer, such as exists in France, would prove that dogs are of that nature. Buffaloes may perhaps be more prone to become violent than other horned cattle, just as mastiffs may be more commonly found savage than Newfoundland dogs; but that is a mere question of degree. Upon the whole, then, I entertain no doubt that buffaloes are to be classed with domestic animals—"animals familiar to mankind"—and I therefore think that the present case does not fall within the second class.

The third class is where the animal, though mansue a natura, is known to its owner to have a vicious and dangerous temper. man keeps, for instance, a dog which he knows to be accustomed to bite sheep or mankind, or a bull accustomed to run at any one in red, he keeps it at his peril, as in the case of a wild beast. But his liability in this case turns entirely on his knowledge of the animal's vicious propensities; for if he is ignorant of them he is not liable for any injuries done in consequence of such propensities. In this respect our law differs from that of other countries, as of ancient Athens and Rome, for instance, as appears from Mr. Pashley's argument and the notes in Card v. Case 5 C. B. 627; and some may think that the limitation on the owner's liability which exists with us is hard upon the sufferers; but this is not a question to be discussed here. The law as I have just stated it, was established at a very early period; as early as the 28th of Henry VIII, "It was agreed by Fitzherbert and Shelley that if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing; otherwise it is, if he have notice of the quality of the dog." I Dyer 25 pl. 162; and the same law was laid down by the House of Lords in a recent case as the law of Scotland. In that case (Fleming v. Orr, 2 Macqueen's Lep.) the owner of a dog which had killed 18 sheep was held not liable (reversing the decision of the Scotch Court) as there was no evidence that he was aware of the vicious propensity of the animal. In Mason v. Keeling, I Lord Rayan, 606, (decided in the reign of William III) the declaration stated that the defendent kept a very ferocious mustiff and suffered it to go abroad unmuzzled and the dog, from the want of proper care of the defendant, attacked the plaintiff and bit him; and the action was held not to lie, as it was not alleged that the owner knew its vicious habit. This case, I may remark in passing, closely resembles the present; in the one, the defendant being charged with negligence in allowing a ferocious dog to go abroad unmuzzled, in the other, with suffering a buffalo to go about without a guard on its horns. In Hudson v. Roberts 6 Ex. 697, where the plaintiff recovered for an injury done to him by a bull which was being driven along the highway by its owner, the decision turned on the fact that the defendant knew the dangerous character of his buil. In the

case of Hammack v White already quoted, the Common Pleas held that a man riding a vicious horse in a public street was not liable for an injury done by the horse, as it was not shewn that he knew the horse to be vicious. And in a case decided last January by the Court of Common Pleas, an action against the owner of a horse which had straved into a road where a child was playing, and had kicked the child, was held not to lie, though negligence and improper care of the horse was alleged, as it was not alleged or proved that the owner knew that his horse was given to kicking. Cox v. Burbidge 32 L. J. CP. 89. In the case before me, there was no evidence that the buffalo was known to its owner to be vicious, but the reverse appeared to be the case. Both the owner and his servant said that they had it upwards of a year, that during that time it was frequently tied in the court-yard of the Government Offices, where there was often a number of ponies, and that it had never done any injury before.

The fourth and last class of cases is where animals ordinarily kept in confinement or control, as horses, cows, sheep, fowls &c. (but not such as are generally suffered to go at large, like dogs,) trespass' upon the property of another. "The general rule of law," says Williams J. "is, that if I am the owner of an animal, in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour. If it does so, I am liable for the trespass and the ordinary consequences of the trespass; and it is perfectly immaterial whether the animal escapes by reason of the negligence of the owner, or in spite of his most diligent care," 32 L. J. C. P. 91., and see 3 Bl. Comm. 211, and Tenant v Goldwin I Salk. In the present case, the buffalo trespassed upon the land of the plaintiff, and therefore Dr. Farguhar would have been entitled to sue the owner for the tre-pass; but to the important question, what damages could be recover in such an action, the answer would be, only such as would compensate "for the ordinary consequences of the frespass" (Per Williams J. in Cox v Burbidge) for instance, for the breaking of the bamboos, the treading down and eating the grass, and injuries of the like kind done by the buffalo "in the ordinary course of its nature." 1

The general principle upon which the owner's liability in the last three classes of cases depends, is stated by Erle C. J. in Cox v. Burbidge, to be, that the owner is in each case liable for acts of the animal done in the ordinary course of its nature, "The owner of a horse" says the L. C. J. "is bound to know, and must in all cases be taken to know, that a horse is by nature likely to stray if not carefully confined, and to walk into pasture and consume grass. For

this therefore the owner is held to be liable. But if a horse does an. act which is not in the ordinary course of the nature of a horse to do, and which no owner would, therefore, without knowing his peculiarly vicious nature, have any reason to calculate on his doing, then he has the same protection as the owner of a dog, that is, he is not liable if he did not know the ferocious nature of his animal." 32 L. So, here the owner is liable for the acts of the buffalo done in the ordinary course of its nature, but not for acts which are not done in its ordinary course. It is unnecessary to say that I use these expressions in the learned sense in which they were used by the same judge whose language I have quoted; and if it be contended that, it is in the ordinary course of the nature of buffaloes to gore other animals, it can only be so contended, as it seems to me, in the same sense in which it might be said of horses, that it is in the ordinary course of their nature to kick other animals. I have no evidence to lend me to believe that buffaloes attack animals except when they are of an unusually ferocious character, any more than bulls, mastiffs, or rams. (Jackson r. Smithson 15 M. & W. 563.)

It seems to me, for the reasons stated, that this action is not maintainable. The injury was not done while the buffalo was under the actual control and direction of the defendants; the animal was not feræ naturæ; nor was it known to the owners to be of a savage and vicious temper. And though an action might have been maintained for the trespass to the land, notwithstanding that the defendants had been guilty of no negligence, still that is not an action in which the value of the pony could have been recovered, and therefore it would be out of the question to allow a count for the trespass to be now added. There must be judgment for the defendants. (a)

(a) See Lee vs. Riley, 18 CB. N.S. 723.

Notes by the Editor of the Penang Gazette.

Singular questions sometimes arise upon the liability of the owners of animals for injuries done by them, and the reasons given by the judges for their decisions in these cases are often still more singular, and savour more of sophistry than common sense.

With regard to wild animals, such as lions or bears, the owner is liable to any injury done by them while in his keeping, without any proof of their ferocity, because he must be taken to have known it (Rex v. Huggins, 2 Ld. Raym. 1583).

According to the Roman law, if a wild beast escaped, the person who kept him would not be liable for any damage he might do after his escape, because such person had ceased to be the owner. "Si ursus fugit et sic nocuit, non potest quondam dominus conveniri: quia desinit dominus esse, ubi fera evasit." (Dig., lib. 9, tit. 1, s. 10). By the English law, however, according to Lord

Hale, the owner of such wild beast would be liable for any injury done by it, "as was adjudged in Andrew Baker's case whose child was bit by a monkey that broke his chain, and got loose." (1 Hale's P. C. 430, part 1, c. 33).

There is, however, a marked distinction between wild beasts, and animals which are domesticated—mansuetæ naturæ. In the case of a dog. bull. ox. ram, and such like animals, if they do an injury to any one, the owner will not be answerable for it in an account for damages, unless it be shewn that he was aware of their vicious propensities. Thus, if a bull passing along a highway gores a man, the onus of shewing that the owner knew the dangerous character of the animal lies on the injured party; and if he does not prove such knowledge, he will be unable to recover any damages. Hudson v. Roberts, 6 Exch. 697). So, if a dog injures a man or sheep by biting them, the owner will not be liable, unless it he shewn that he knew the dog's propensity for biting. (Mason v. Keeling, 1 Ld. Raym 606). Where, however, it is proved the owner was aware of the savage disposition of the animal he kept, it cannot be objected that it escapsd and went at large without any default on the part of the owner, because he is bound to keep it secure to all events. (May v. Burdett. 9 Q. P. 113; Smith v. Pelah, 2 Str. 1264.)

The law with regard to horses appears to be the same. In the recent case of Cox v. Burbidge (9 Jur., N. S., part 1, p. 970), a horse strayed on the high road, where he kicked a child who was lawfully upon the highway; it was held by the Court of Common Pleas, that even assuming the horse was a trespasser, no action would lie against the owner even although the horse strayed through his negligence, unless it were proved that the horse was likely to commit such The principle upon which the judgment proceeds is, that the owner of the horse was liable only for such acts as a straying horse was likely to com-Hence the learned Chief Justice in giving judgment, says, "The owner of a horse is bound to know, and must in all cases be taken to know, that a horse is by nature likely to stray, if not carefully confined, and to walk into a pasture and consume the grass. For this, therefore, the owner is held liable." "But," adds his Lordship, "if a horse does an act. which it is not in the ordinary nature of a horse to do, and which no owner would, therefore without knowing his peculiarly vicious nature, have any reason to calculate on his doing, then he has the same protection as the owner of a dog. It is not in the ordinary course of the nature of a horse to kick a child, and, therefore, the owner is not liable, uuless he is proved to be aware of the tendency of the horse to commit acts of that kind."

Now, we should have thought, before reading his Lordship's judgment, that the reason why the owner of a horse is liable for the damage occasioned by it consuming the grass of his neighbour, is, that such owner is liable for acts of the horse by which he derives a benefit.

, With respect to the point actually decided by the Court we can readily conceive, that if the child had been a trespasser, and had gone into the field where the horse was kept, the owner ought not, according to previous decisions, to have been liable for the injury occasioned to the child. But we think that his Lordship goes rather too far when he assumes that a horse that strays on a public road is not likely to commit acts endangering the public safety.

The case does not appear materially to differ from Lynch v. Nurdin (1 Q. B. 29; 3 Jur. 797) and Illidge v. Goodwin (5 Car. & P. 190), in each of which cases the owner of a horse and cart, who negligently left them unattended in the street, was held liable for the injury, done thereby. In those cases, indeed.

negligence was proved; in the case now under discussion no such proof was given, but the learned judge in his judgment assumed it to be capable of proof, or proved. Now, if we assume that a horse and cart, left in a road negligently, are likely to be dangerous, and that therefore the owner is liable for the injury that may be occasioned by such cart and horse, why are we not to arrive at the same conclusion with regard to a horse unattached to a cart allowed negligently to stray upon a public road?

Whether the necessity of proving the mischievous propensity of domesticated animals, as a condition precedent to obtaining damages for acts done by them, proceeds, upon a correct principle, may well be doubted. The proof in most cases is difficult, in some cases almost impossible, even where the owner may

have been himself well aware of the vicious character of the animal,

Notwithstanding, therefore, the decision upon this subject have laid down the distinction so clearly between the liability of the owner of wild and domesticated animals for any injury done by them, we think the rule would be much more just if in the case of all animals, without distinction as to their character, and without the necessity in the case of domesticated animals of any proof that their ferocity was known, that the owner should be liable for all injuries caused by their acts, provided that they were not occasioned by any fault on the part of the person injured.

# July 22, 1863.

Before the Hon. Sir P. Benson Maxwell,—Recorder. Schmidt and others v. Spalin.

An agreement not to establish a person's self in "Penang or Singapore, or to enter into any other business existing in those places, as clerk or partner within two years without the special consent of the plaintiffs," is reasonable and good, and not void as being not general and extensive. The words "any other business," bearing in mind what the parties to the contract are and what are the surrounding circumstances at the time, mean such business as both parties are, or intend to be, engaged in.

If an infant enters into a contract abroad, the law ( as to majority ) of the country where the contract was made, must govern the contract, and what that

law is; must be given in evidence as a fact.

The object of this suit and the circumstances which gave rise to it will appear sufficiently from the judgment.

Mr. Aitken appeared for the plaintiffs, and Mr. Campion for the defendant.

The Judge.—The plaintiffs in this suit pray for an injunction to restrain the defendant from assisting Mr. Ventre, a merchant of this place, in his business, or otherwise acting in violation of an agreement entered into by him not to enter into business or act as clerk or partner. It appears from the Bill and answer that the plaintiffs carrying on business in Pinang and Singapore as merchants and factors, engaged the defendant in Switzerland, in May 1859, as their clerk for three years, to be computed from his arrival in Penang; and the contract, which was in German, contained a

stiumlation to the following effect: "After the expiration of this time (the three years ) Mr. Henry Spalm is entirely free from his engagement; nevertheless he is under the obligation not to establish himself in Penang or Singapore, or enter into any other business existing in the two named places (in ein anderes auf diesen plätzen bestehendes geschäft ) as clerk or partner within two years without the special consent of the plaintiffs." The defeudant arrived here in September 1859, and fulfilled his engagement for the three years, which expired in September last; and during that time, as he admits, he acquired a full knowledge of the plaintiffs' business as general merchants and factors; he had free access to their correspondence, books, accounts and other papers, and acquired a knowledge of the tastes of native purchasers in respect to the wares dealt He then left them, and, in the terms of his answer, " on the 1st of January last became associated with Mr. J. J. Ventre, a merchant and factor carrying on business in Penang," and he has since that time been employed in Mr. Ventre's counting house, attending there daily, writing letters and making sales, as a clerk or partner would do. He admits also that he has " written to merchants and manufacturers in Europe, some of whom send goods to the plaintiffs for sale, requesting them to consign goods " to Mr. Ventre's house; adding that he was " acquainted with most and the principal" of them before he left Europe.

It is clear, upon these admissions, that the defendant has broken his contract; and indeed this was not disputed. His defence consisted of two points; first, that the stipulation in question was void on the ground that it was an unreasonable restraint of trade and without consideration; and secondly, that he was an infant when he signed the contract.

With respect to the first, I consider that the rule of law to be gathered from the numerous decisions on agreements of this nature is that a contract in general restraint of trade is void; and a contract in partial restraint is also void, unless it be reasonable. To be reasonable, the contract must be made for some consideration; and the restraint must not be wider than is necessary to afford a fair protection to the interests of the person in whose favor the contract is made. If the restraint is wider than is necessary for that purpose, and the excess is in its nature separable, it may be separated, and the residue is valid. If it is not separable, the excess vitiates the whole; and the contract not being necessary to the one side and being oppressive to the other, is regarded as mischievous to the public and is therefore void. Homer v. Graves 7 Bing. 743, Mitchel v. Reynolds 1 P. Wms. 181, I Sm. L. C. But when the

restraint is not wider than is necessary, the contract, so for from being regarded as injurious, is considered highly beneficial both to the parties and to the public. As it has been well pointed out, it is advantageous to the employer to obtain the services of an intelligent and useful clerk or assistant with the security and that he will not become his rival after he has learned his business, and has become acquainted with the customers and connections of his employer. It is advantageous to the clerk, as he might not on other terms obtain employment; for as Erle C. J. said in a recent case, "if such agreements were discouraged, employers would be extremely scrupulous as to engaging servants in a confidential capacity"; and merchants in the position of the plaintiffs would find it to consist better with their interests to employ natives of India or China as their clerks, than to go to Switzerland for one. is advantageous to the public as promoting the interests of trade. See the judgment of the Court of Exchequer in Mallan v. May. 11 M. & W. 653, and of Erle C. J. in Mumford v. Gething, 29 L. J. C. P.

As to the consideration, though it was formerly held that a contract of this kind could not be supported unless there was a substantial consideration for it, adequate to the restraint; it is now established, at law, that the Court will not inquire into the adequacy or extent of consideration, Hitchcock v. Caker 6 A. & E. 439, Archer v. Marsh Id. 966, Leighton v. Wales 3 M. & W. 545, Pilkington v. Scott 15 M. & W. 657. Any consideration, however nominal or colourable, is enough; and if any is necessary, contrary to the general rule, where the contract is by deed, if is in order to satisfy the rule that the agreement should be reasonable, which it would not be, in law, if it were wholly without consideration. though the amount or adequacy of the consideration is a matter for the exclusive determination of the parties and not of the Court, (Mallan v. May, Archer v. Marsh). A Court of Equity, indeed, would be more influenced by this circumstance, because, in the exercise of the discretion which it assumes in dealing with such subjects, it might decline to enforce the contract, as it declines to enforce all other kinds of contracts, when it deems them hard and See for instance, Kimberley v. Jennings 6 Sim. unconscientious. 340, Falcke v. Gray 29 L. J. Ch. 28, Tildesley v. Clarkson. 31 L. J. Ch. 362.

In this case, however, the question of consideration cannot be said to arise; because, though some observations were made in the course of the argument, as to the inadequacy of the salary, I am clearly of opinion that even if those observations were well founded,

there is quite consideration enough to support the promise on the face of the contract. The more important question is whether the restraint is or is not greater than is reasonably necessary for the iust protection of the plaintiffs; and I have, after some consideration come to the conclusion that it is not. No objection was made to it on the ground of being too general, in respect either of the space or of the time to which the restrictions applied; but the restraint was said to be too general on the ground that it extended to pursuits in life entirely foreign to those of the plaintiffs. It was on this account, it was contended, wider than their interests reasonably required, and therefore was void. The restraint certainly appears at first sight very extensive; it is " not to establish himself in Pinang or Singapore, or enter into any other business existing in those places. as clerk or partner." This, it was said by the defendant's advocate, would exclude him from every calling and pursuit, from agriculture, for instance, as well as trade, the word "business" being wide enough to embrace both. But it is plain that this was not the sense in which the term was used or unmerchant for the services of the former provides that the clerk shall not enter into any other business at the end of his engagement, it is absurd to suppose that they referred to or thought of any other business than mercantile business. And this is the sense in which I think the word is to be understood in this agreement. There still remains the question, however, whether an engagement not to carry on any "mercantile business" for two years in Penang and Singapore is too wide a restriction. On this point I have had some doubt; but the case of Avery v. Langford, 23 L. J. Ch. 837; which was not referred to on either side, seems to me to be very much in point. There, the plt, and deft, carried on the business of general merchants in a country town in Cornwall, and the deft. on selling his business to the plt. agreed to be understood by the parties. In constraing an agreement it is necessary to bear in mind what the parties to it are, and what were the surrounding circumstances at the time: and when a contract between a merchant's clerk and a merchant to enter into a bond conditioned to pay the plt. 2000l, if he, the deft. should, after a certain day, be concerned 'in any trading establish. ment" within certain limits; and Vice Chancellor Wood held that the deft, was bound to give the bond. "The business," he says. "was that of a general merchant, which, as was well known, in a country place comprised almost every kind of trade; and therefore it appeared to be right that the plt. should be protected against the deft's dealing in almost every article within the district." Here. the plts, describe themselves as " merchants and factors" and in the

answer they are in one passage spoken of as " general merchants and factors," and, unless I am misinformed, this business includes, to use the Vice Chancellor's language, "dealing in almost every article." Though the sale of cotton goods is an important part of their business, I do not understand that they confine themselves to it, or restrict themselves to any particular class or classes of goods, any more than other merchants and factors in the settlement, "A reasonable construction," the Vice Chancellor went to say, " would be put upon the words (trading establishment, ) which in popular language would not necessarily include all the trades under the bankrupt laws .....The Court would construe the bond by reference to those businesses in which he was at the time engaged, or might be likely to be." These observations are directly applicable to the case before me; and I think that, under the circumstances, the restraint stipulated for was not more extensive, as regards the nature of the business to be abstained from, than was reasonably necessary to protect the plaintiffs. I am of opinion therefore that the first defence fails.

As to the plea of infancy, the question was argued on both sides as if it was governed by English law; and if it were so, I should hold that the defence must prevail; for though much reliance was placed on a passage in Mr. Sergt. Stephen's Commentaries ( taken from Keane v. Boycott ) to the effect that all contracts which the Court can pronounce to be for his benefit are binding on an infant, and I was urged to hold that the contract in question was manifestly so. I do not understand the pas-age to mean that every contract is binding in all its parts which a Court of justice, after investigating all the circumstances under which it was entered into and weighing its effect and consequences, would hold to be, upon the whole, to his advantage—the very case in question shews the contrary-but only, that to the general disability to contract, the law annexes an exception where it is positively necessary, and on that account for his advantage, that an infant should have the power of binding himself. It is for necessaries only that an infant can bind himself, and he is enabled to contract for them because such a power is essential to his well being. Lord Cake in an often quoted passage mentions contracts for food, apparel, physic and good teaching as the exceptions out of the general disability, ( Co-Lit. 172 a); and the list has not been much extended since. But assuming that the agreement for his services at a certain salary as clerk was valid ( Wood v. Fenwick, 10 M. and W. 195, ) it would not follow that that part of the contract which restrained him from

entering into business would bind him. It would not be more so that the covenants in an apprenticeship Indenture, which according to the authority quoted by Mr. Aitken cannot be sued upon, at all events, being altogether unusual, and plainly prejudicial to the infant, it would not bind him and if not separable from the residue, would vitiate the whole contract.

It was further said that the agreement was ratified after the defendant attained his majority, by continuing in the plaintiff's employment under it. But to this it was answered that Lord Tenterden's Act (a) requires that the ratification of an infant's contract should be in writing; and it was admitted that there was no writing. It is unnecessary, therefore, to consider whether the mere continuance in the employment and the receipt of the salary would at common law have been a ratification of every part of the contract.

The question, however, as I have said, of the defendant's capacity to enter into this agreement is not to be determined by our law, but by that of a foreign state, and I have had no evidence as to what that law is. The defendant is a native of the Canton of Schaffhausen and was domiciled there at the time of the contract; but the contract was signed by him at Niederuzwyl in the Canton of St. Gall. Evidence was given to shew that by the law of the former Canton, 21 is the age of majority; but I could get none, as to whether the contract was valid according to the law of St. Gall yet it is by this law as it seems to me, that the question must be govern-The law of the defendant's domicile determines his capacity as to all contracts executed there; but with respect to contracts entered into by him elsewhere,—it is established by our law that the law of the place where the contract was made determines capacity, at \$1. Story Confl. L. sects. 101, 130. Thus, if a person who is a minor in his own country till 25, enters into a contract here, the contract at 21 is binding on him. In Male v. Roberts 3 Es p. 163, an Englishman was sued upon a contract entered into in Scotland, and he pleaded infancy. Lord Eldon held that the question was whether he was an infant by the Scotch law. "What the law of Scotland." he said, "is with respect to the right of recovering against an infant for necessaries, I cannot say; but if the law of Scotland is, that such a contract as the present could not be enforced against an infant that should have been given in evidence; and I hold myself not warranted in saying that such a contract is void by the law of Scotland. because it is void by the law of England. The law of the country where the contract arose, must govern the contract; and what that

<sup>(</sup>a) 9 Geo IV. c. 14. extended to India & the Straits by Indian Act 14 of 1840.

is, should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what" that law is, without evidence.

I therefore think that the second ground of defence has not been established. And that the plts are entitled to the injunction for which they pray. As, however, the deft appears to have been under an entire misapprehension on the question by what law the plea of infancy was to be determined, I think under the peculiar circumstances,—although such a plea is little entitled to favor—that if he should find himself within the next four or five months—abundant time to enable him to write to and hear from Europe—in a position to establish clearly that the contract would not be binding on him according to the law of the Canton of St. Gall, I ought not to refuse to re-hear the case. (b)

(b) Leave to have the case re-heard was applied for on the 6th of January 1864, by Mr, Campion, but was refused by the Judge on the ground that the time accorded to him had past—see Harms vs. Parsons 32 L, J. ch. 247. Elves vs. Crofts 10 C. B. 241.



22nd June 1864.

Before sir P. Benson Maxwell, Recorder. Khouse Miah Malim vs. Anamaleh Chetty.

To support the count for use and occupation there must be a contract between the parties, express or implied.

An action of trespass for mesne profits cannot be sustained if the plaintiff has

not entered on the premises.

THE JUDGE. - In this case, the defendant took a house from the plaintiff's testator, for one year from the 1st of March 1859, at the rent of 125 dollars. Before the term expired the testator died in India. Abdul Kadir Marican, who had been his agent in his life time, while yet ignorant of the death, agreed as such agent, with the defendant and the defendant agreed with him that thet tenancy should continue from month to month at the same rent; bu hearing soon after that the testator was dead, the defendant refused to pay rent to Abdul Kadir Marican, who sued him in his own name in the Court of Requests for \$31.24, being three months'rent. The defendant set up the testator's death, and the Commissioner of the Court of Requests decided that Abdul Kadir Marican was not entitled to recover; but he also went on to order that the defendant should pay into Court the \$31.24 sued for, and further should pay monthly into Court the sum which he had agreed with Abdul Kadir to pay as rent, until further orders, that is, I suppose, until some body came and established his title to the premises to the Commissioner's satisfaction. The defendant paid altogether \$89.79 cents under this order, and he expended in necessary repairs \$ 7.50. He continued in possession till 23rd of April 1861, and then left the house and went to India. He returned last August, and lodged for 7 or 8 days in the same house, which was then occupied by other persons; but it did not appear that they occupied as his tenants or servants. The plaintiff is the executor of the testator; he proved the Will in this Court in May 1863, after which he applied to the Commissioner of

the Court of Requests for the money paid into that Court by the defendant, and it was paid to him. He then brought this action for the use and occupation of the premises, or for the profits of them, down to the present time. He has not yet entered upon the premises, or recovered judgment in ejectment for them.

To support the count for use and occupation there must be a contract between the parties, express or implied. (a) The question is whether any can be collected from the above facts. 1 think not. When the agreement to continue the tenancy was made, at the expiration of the original term, Abdul Kadir Marican acted as the agent of the testator; but he was not his agent, for his authority had been revoked by the testator's death. There was therefore, no contract between the testator and the defendant nor was there any between the plaintiff and the defendant. The contract with Abdul Kadir Marican was not made in the name or behalf of the plaintiff, and he therefore cannot claim the benefit of it, or give it validity by ratification. Nor can any contract between him and the defendant be implied from the order of the Commissioner of the Court of Requests and the payments made into the Court. Without considering the general nature of an order in a suit between A & B, which not only dismisses A's claim, but orders B to pay the amount sued for into Court, for the benefit, it must be presumed, of some other person, known or unknown, who may afterwards establish a right to it, it is enough to say that the Commissioner was not the agent of that person to let his house, and that even if he had been, no contract could be inferred from his order to pay what he called rept, monthly, into Court, and from the defendant's compliance with such order. But if there was no fresh contract after the expiration of the term for a year, the plaintiff, on its expiration. had a right to enter, for the reversion was then vested in him, and the defendant became a tenant by sufferance, that is, one who "at the first came by lawful demise, and after his estate ended, continueth in possession, and wrongfully holdeth over" Co. Litt 57b. But it is of the essence of this tenancy that it is not founded in contract. If it were, the possession would not be "wrongful," if it were with the assent of the reversioner, it would be a tenancy at will at least, and not a tenancy by sufferance. There being no contract, then, express or implied, the count for use and occupation cannot be maintained.

The only other question is whether the plaintiff can recover on the count in trespass, for the profits while the defendant was in occupation of the premises. But here, again, he must fail, because he has not entered on the premises. Co. Litt. ubi sup. Adams Ej. 342,

The result is that the judgment must be for the defendant.

<sup>(</sup>a) See 5 Ex. 553. 19 LJ.; Ex. 318. 22 LJ. CP. 219.

# 15th June 1864. Before Sir Benson Maxwell,—Recorder.

Khu Teen v. Shiramaleh Marican.

If a jettison of cargo becomes necessary in consequence of any fault or breach of contract on the part of the owner or master, such as the vessel being in an unseaworthy condition, such jettison is attributable to that fault or breach of contract, and not to sea peril, though that also may be present and enter into the case, and the owner or master must bear such loss.

If a cargo on board is damaged in a storm by the negligence of the master or crew in storing or keeping by the same, such as the hatches not being properly secured such loss or damage falls on the master or owner.

The Judge.—This action is brought against the Master of a brig for not delivering a quantity of rice to the plaintiff, and for delivering another quantity in a damaged state. The defence is that the default was owing to perils excepted in the bill of lading, viz. dangers and accidents of the seas, &c. The evidence in support of this plea proved that the brig, which Itad left Rangoon for this port on the 1st of November last, encountered a gale on the 4th and 5th, and that part of the plaintiff's rice was thrown overboard on the latter day, and part was damaged by sea water penetrating into the hold through one of the hatches. The question is whether this jettison and damage occurred under such circumstances as to exonerate the defendant from all liability in respect of them.

Upon the first point it was contended for the defendant that the jettison was necessary to save the ship, crew and rest of the cargo from perishing; and I have no doubt that the sacrifice was made in the honest belief that it was necessary, That there was great alarm on board is probable. The log book speaks of the crew being lifeless through terror, of their shaking, and praying, and roaring, It was said on the other side, that these fears were not well founded, and that the rice was thrown overboard through unreasonable timidity, and the evidence of Capt. Martin and Capt. Shepherd, experienced mariners who visited the brig on the day after her arrival, and who state that she was not leaking. and that she had no signs of straining about her hull or rigging, may perhaps support this view. But it is unnecessary to express any opinion about it: for after considering the whole of the evidence the conclusion to which I have come is that if the sacrifice of the plaintiff's cargo was necessary, the necessity was owing to the unseaworthy state in which the vessel started on the voyage; and the loss therefore falls on the defendant. "There can be no doubt that a loss by a jettison, occasioned by a peril of the sea, is a loss by a peril of the-sec. In that case, the sea-peril is deemed the proximate cause of the loss. But if a jettison of cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract; and not to sea-peril, though that also may be present and enter into the case," per cur in Lawrence v Minturn. 17 Howard's (American) Rep. 111., see also Schloss v Heriot 32 LJ. CP. 211. Capt. Martin says, that the entrance to the cabin was very wide, that it was only six inches above the deck, and that it was without slides to prevent the water from pouring in, Capt. Shepherd considers that if she had shipped a sea, her cabin would have been filled, and she must have been swamped. The same witness described her rigging as fine weather rigging, that is, as not calculated for rough weather. The cargo was thrown overboard, according to the defendant and the tindal of the vessel, after the gale had subsided. Capt. Shepherd found the brig "in excellent trim" when she arrived here, and, as I have already said, she was not leaking or strained any where. No damage was sustained by the rice in the hottom of the hold. The conclusion which I draw from these facts, is that whether owing to the unprotected state of the cabin entrance, or to whatever other cause, the defendant found that the cargo, though not more perhaps than the vessel might have carried in fine whether, was too much for her in rough weather. In other words, she was overloaded, that is, unseaworthy; and as the loss is in my opinion to be attributed to this cause, it must fall on the defendant.

With respect to the damage done to the partially injured rice, it arose from the sea water getting into the hold down the fore hatchway. This, the plaintiff contended, was to be attributed to the insufficient and negligent manner in which the hatches were secured. The defendant denied this; and several of his witnesses swore very positively that it was secured with all the means and appliances described by Mr. Martin and Mr. Shepherd as necessary and usual on board European vessels, viz: with two or three tarpaulins, caulking and pitch. It is enough, however, to remark that this evidence was given after the two gentlemen just named had been examined, that it is hardly consistent with the account given by the same witnesses of water getting to the hold by an injury to a single tarpaulin; and that it contradicts the evidence of the defendant himself, who admitted that the hatches, when the ship left Rangoon, were covered only with one tarpaulin nailed to the combings. He even said that after the rice was thrown overboard and the wind abated, the tarpaulin was replaced in the same manner, and so remained until the arrival of the brig. If this latter statement be true, and Capt. Shepherd visited the vessel before the hatchways were opened, they were secured by a single tarpaulin fastened to the combings by three nails on each side, and so loosely drawn over the hatches, that Capt. Martin was able to pass his arm under it. It may be that the tarpaulin was more securely fastened than this, at Rangoon; but I can give no credit to the witnesses who speak of two tarpaulins and mats and caulking and pitch being used. The defendant, however, maintained that the single tarpaulin fixed with nails was sufficient, and he said that no water-would have penetrated to the hold if one of the water casks on deck, which, he says, broke from its lashings during the storm, had not knocked against the tarpaulin and injured it. The log mentions that a water cask did get loose, and that it knocked against the bulwarks and cabin door, but it makes no mention of any injury done to the tarpaulin; Golam Kadir, the second mate, says that the tarpaulin was raised and swelled up by the water on deck, and when in that state was torn up by the water casks, and the batches were forced up by the water, which thus got to the hold. That the tarpaulin was raised and swelled up is not improbable; Capt. Martin's evidence is confirmed by the statement; but if true. the water would probably have got into the hold, even if the tarpaulin had not been torn, about which I have much doubt. It is remarkable that the log book though not noticing the circum stance that the water cask got loose, and bumped against the bulwarks and cabin door, makes no mention of its injuring any tarpaulin; and the witnesses are not even agreed as to which tarpaulin was torn, for while Mahomed Tamby, the chief mate, speaks of the tarpaulin over the fore hatches, Golam Kadir speaks of that which was over the main hatches. and denies that any thing happened to the fore hatchway. But whether the tarpaulin was torn or not. does not seem to me material. If it was, and the injury to cargo was the consequence, it only confirms the opinion that the hatchway was not properly secured. I think that the damage done by the sea water to the plaintiff's rice was owing to the negligent maner in which the hatches were secured, and that the defendant consequently is liable for the damage which resulted. There will be judgment, therefore, for the amount claimed, deducting the freight.

#### 25th June 1864.

Before Sir P. Benson Maxwell, Recorder. Lim Sun Poh vs. Lim Kin.

A conveyance of lands by an Administrator who is also a ppointed Executor in a concealed Will, is binding on the other Executor, provided the deed purports to convey not only his estate as Administrator therein, but the fee absolutely without reference to his character of Administrator, or other qualification.

The word "Administrator" in such deed is merely descriptive of the party

conveying.

QUELLY.—Will an action lie at the suit of one, out of several Executors, the others being alive.?

THE JUDGE.—This is an action to recover a piece of land in Pulo Tikus, under the following circumstances:—

Lim Song, being seised in fee of the premises in question, made his Will in 1842, appointing the plaintiff, Lim Ah Hi and Lim Cheng Nioh, his executors, and died shortly afterwards. The Will was concealed until recently, and the executrix, in 1850, obtained Letters of Administration of the testator's estate and effects, and entered upon the premises. In 1856 she conveyed them to the defendant by a deed thus: "Know all men &c. that I, Lim Cheng Nioh, the widow (a mistake for daughter) and administra trix to the estate and effects of Lim Song &c., do grant, bargain and sell to Lim Kim &c. the land now in dispute. To have and to hold unto him, his executors, administrators and assigns for ever.' In 1863, the Letters of Administration were revoked, and the Will was proved by the plaintiff, who has now brought ejectment to recover the premises. Mr. Campion, for him, contended that the grant of the Letters of Administration were void ab initio, and that all the acts of the administratrix, in that character, including the conveyance to the defendant, were equally void. The general proposition, for which 1 Wms. Exors Pt. 1 Bk. 6 c. 3 was cited, was not disputed by Mr. B. Rodyk, who appeared for the defendant; but he contended that the conveyance was valid, inasmuch as the party conveying was executrix: and it seems to me that this is the right view of the question. The word "administratrix" in the deed is merely descriptive, like the other word "widow." The conveyance is not limited to such estate or interest as was, or might be vested in the conveying party, as administratrix; it described her at the beginning as the widow and administratrix of the deceased, but it conveyed the land to the defendant in fee absolutely, without reference to her character of administratrix, or other qualification. It was intended to pass all the right and property of the party conveying; and the conveyance operated, it seems to me, as far as she had power or state to give it effect. In a case before Wigram V. C., of which I have not found any report in Hare's Reports but which I heard argued and dicided, a husband and wife assigned a reversionary chose in action of the latter. It afterwards turned out that the marriage was null, the husband having another wife alive at the time of this marriage; and it was contended that as the deed would not have been binding on the married woman if she had been a lawful wife, it ought not to bind her as feme sole, since she executed it as a

married woman. But the Vice Chancellor held otherwise: and his decision seems stronger than the present, seeing the fraud which had been practised on the conveying party. See also Starr v. Sturge 2 M & K. 192. But executors have a joint and entire authority over the whole of their testator's personal property; an assignment of a term by one of several executors binds the other. Dver 23b; and as they derive their title from the Will, and not from the Probate which is merely the required authentication of their title, such an assignment, is valid, shough before Probate. Here, indeed, the property in question is not chattels real, but real estate. But the Act 20 of 1837 enacts that as far as regards the transmission of immovable (real) property in this Settlement, on the death and intestacy of the owner or by his Will, such property is to be taken to be of the nature of chattels real, and not of freehold; and it seems to me that under this Act the executors or administrators have the same powers over real estate vesting in them under this Act, as they have by the general law of the land, over chattels real and therefore that any one of them has power to sell and convey it.

In the view of the case which I have taken, it is unnecessary to decide whether this action would lie at the suit of one of the executors alone. But I may say that Doe v. Wheeler 15 M & W 623, which was cited by the plaintiff, is not decisive of the question. The plaintiff, there, was not the executor; and the Court only held that a demise to him by two of three executors was a good

demise of the premises.

Judgment for the defendant.

# 3rd August 1864.

BEFORE SIR P. BENSON MAXWELL, -- Recorder, REGINA. vs. R. M. D'OLIVEIRO.

A person is not bound to pull down an attap (or other such inflammable material) roof or external wall of a house built before the coming into operation of the Conservancy Act 14 of 1856, unless such house "is contiguous to or adjoining any other building," altho' such roof or wall is put up or erected after the Act came into operation. A detached hut and building might be suffered, not only to stand as they were, but to be repaired, so long as such repairs did not amount virtually to a renewal of the structure until they fell to pieces.

Query-Whether putting a new roof on a hut, is a renewal, not

of the roof, but of the hut?

QUERY—Is a "house" included in the words "huts or other buildings" used in the 36th section of the Act?

The 36th section of the Act being a penal enactment must be construed strictly.

The defendant was convicted and fined by the Magistrate of the Island, for having failed, after due notice, to remove the attap roof put upon his house since the passing of the Conservancy Act, the house being situated within the limits of the town, as defined by the Municipal Commissioners.

Mr. Rodyk had on a former day obtained a certiorari to remove the conviction for the purpose of its being quashed, on the ground that it was bad on the face of it.

The following is the section of the Conservancy Act under which the conviction was made.

"XXXVI. The external roofs and walls of buts or other buildings.

Roofs and external walls of houses not to be made of combustible materials. ernal roots and walls of fluts or other buildings erected or renewed in or near any street after the passing of this Act, shall not be made of grass, leaves, mats or other such inflammable materials; and it shall not be lawful for the owner of any hut or other building in or near

any street now having an external roof or wall made of any such material, and which is contiguous to or adjoining to any other building, to suffer such roof or wall to remain for a longer time than two years after the passing of this Act, unless with the consent in writing of the Commissioners; and whoever makes any external roof or wall of such materials, or suffers any roof or wall made of such materials to continue contrary to the provisions herein contained, and who shall not remove or after the same within one month after notice given to him for that purpose by the Commissioners, shall be liable to a penalty not exceeding ten rupees for every day that such roof or wall shall continue."

Mr. Rodyk, in moving for the certiorari, contended that the conviction was had for not showing that the house of the defendant had been erected since the Conservancy Act came into operation, or that it was contiguous to or adjoining another building. In support of this view, he cited a case of Reg. v. Mira Lebby, decided in this Court by the present Judge in September 1857 (See the Penang Gazette of the 30th of September, in that year).

The conviction was returned with the depositions; but it did not appear upon the latter whether the house had been built before or since the passing of the Conservancy Act of 1856, or whether it was contiguous to another house or not. The question raised by the proceeding was whether the owner of a detached house situated within the town, and in existence when the Conservancy Act was passed, was, since that Act, at liberty to put a roof of attap, or inflammable materials on his house.

Mr. Plunket, the Magistrate, shewed cause against quashing the conviction, and contended that the 36th Section of the Act prohibited the construction of a new roof or wall of inflammable materials, whether the house was built before or after the passing of the Act; and whether adjacent to other houses or not.

THE JUDGE. - The object and scope of the whole section

seems to me to be this. The Legislature desired to preserve towns from the danger of fire arising from collections of buts and other buildings constructed, as they generally are in these countries, of grass, leaves and other such combustible materials. In dealing with the subject, it had to consider two classes of property, viz: huts and buildings which should be erected after the passing of the Act, and buts and buildings already in existence. As to the former, there was no difficulty in simply and peremptorily prohibiting the construction of any, with grass or other dangerous materials. As to the latter, it was to be gathered from the language, what might almost be presumed a priori, that the Legislature, while protecting the paramount interests of the public, desired to interfere with private rights so far only as the public interests absolutely required and no further. Huts and buildings made of leaves were very perishable. In the course of very few years they must tumble to pieces; and they could not be replaced by others of the same kind, owing to the general prohibition against new huts. Some existing structures could not be suffered to continue standing even for that short space of time, viz; those which were contiguous or adjoining to other buildings; and their removal was therefore required within two years. As to detached huts and buildings, they might be suffered, not only to stand as they were, but to be repaired, so long as such repairs did not amount virtually to a renewal of the structure, until they fell to pieces. It was accordingly enacted, with reference to hits and buildings to be built after the Act, that whether they were built on the site of old ones or on new sites, in other words whether built or renewed, i. e., rebuilt, the roofs and walls should not be made of inflammable materials; and with reference to existing ones, that they should not be suffered to stand more than two years, if contiguous or adjoining to other buildings. This seems to me was the whole extent of the prohibitory enactment, read by the rules of legal construction.

Reading the section thus, the words "erected or renewed" agree with, or qualify "huts and buildings," and not "external roofs and walls." I hold this to be the right enstruction, in the first place, because qualifying words, like words of reference, should be read as applying to the last antecedent, unless there be some good reason against it. But it is said that such a reason is to be found in the words themselves. "Renewed," it is said cannot properly be used respecting a hut or other building, while it is applicable and commonly used in speaking of the construction of a new roof. This argument might be retorted by taking the other word, "erected", which certainly is applicable to a hut or building, though hardly so

to a roof. But I do not feel weight of the objection. If a roof may be said to be renewed when a new one is made. I do not see why a hut should not be said to be renewed when it is reconstructed. The word seems to have been used to meet an attempted evasion of the Act in two ways. By leaving an in-ignificant portion of the old building, when constructing what was, in substance, a new hut, the owner might possibly contend that he had not erected a new but, and yet find it difficult to deny that his old one was in reality rebuilt, or renewed, by the extensive alterations made in it. Or, if he built an entirely new hut on the site of the old one, it might perhaps be open to him to contend that the prohibition against erecting new buts applied only where buts had not been in existence previously; but it would not be easy to establish that the word "renewed" did not meet the case of a construction on an ancient site. The word "renewed" was probably used to meet such cases. Whether putting a new roof on a but, was a renewal of the roof, but of the hut, might possibly be a question, but this was not contended now, nor was the conviction for renewing the house.

It was next contended that the clause imposing the penalty, points out that "roofs and walls" of all houses old or new, are the subjects of the prohibition, and not merely those of new huts: I do not follow this reasoning. Unquestionably what is prohibited is "roofs and walls", but the question is whether the prohibition applies to those of old huts and buildings, and the penal clause only imposes a penalty in respect of roofs, &c., made "contrary to the provisions herein contained", that is, contrary to the enactment at beginning of the section. If it had spoken of roofs and walls "erected or renewed" contrary to the preceding provision, there would have been a stronger ground for the argument.

Another reason for construing the words as I do, is, that a different construction would make the clause very ill-framed, and the words in question wholly unnecessary. If the intention was that no new roofs or walls of any buildings, old or new, should be made of grass &c., the Legislature would have said so in those plain terms. The section would have run. "The external roofs and walls of huts and buildings shall not, after the passing of the Act, be made", or, "be erected or renewed" of grass &c., and not that roofs and walls erected or renewed after the Act shall not be made &c.

I may add here, that it may be a question whether the words "huts or other buildings" include a "house," the species of structure mentioned in the conviction. It is a rule of legal construction that a general word following a particular one is to be construed as confined to things of the same nature as the latter. For instance, the Act

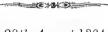
which forbids tradesmen, artificers, labourers or other persons whatsoever to exercise their ordinary callings on Sunday, does not include a coachman or an attorney, because neither is a person whose calling is similar to that of the classes particularly named; Sandiman v. Breach 7 B &C 96. Peate v. Dicken 1 C M & R 22. Whether a house constructed of wood or stone, is a building of the same kind as a hut, and whether the more important structures would not have been specifically named—especially as "house" is the generic term, and is repeatedly used in other sections—if the Legislature had not intended to confine the prohibition to huts and other structures like huts, consisting wholly of grass, leaves, mats &c., are questions which may be worth considering, but on which, as it is not necessary, I avoid expressing any opinion now.

It has been suggested to me, that the marginal note of the section might be taken as a key or guide to the meaning of the Legi-lature; and that in the present case it tends to support the construction put upon the section by the Magistrate, as it says, generally, that roofs and walls of houses are not to be made of combustible materials. This might be admissible sometimes perhaps; but then it must be borne in mind that the marginal note is only a general indication of the nature of the enactment to which it is attached. There may be simple cases where the words of a section are susceptible of two meanings, and the marginal note may decide which of the two is the true one. But it could be resorted to for such a purpose, I think. only where there is nothing in the body of the section to clear up the ambiguity. But here the marginal note would be invoked to control a construction sanctioned and required by several well established rules, and this, I think, would not be done. If any thing might be gathered from the note, it would be the conjecture whether the word "houses," which occurs in it, does not indicate that the same word stood in the section also, as originally framed, and was designedly struck out.

There being nothing in the language to require that the qualifying terms "erected or renewed" should be applied to any but the last antecedent words, are there other reasons for departing from the rule of construction? The object of the enactment is to guard against fires in towns, and it may be said that the Act should be so construed as to meet the mischief most effectually, and, as Coke says, to "advance the remedy." Unquestionably, the Act would be much more stringent if the other construction were adopted, and the remedy would be more advanced. But this rule is subordinate to the more general one, that the intention of the Legislature is to be gathered by reading the terms in which it expresses itself in their plain

meaning and according to the ordinary rules of construction; and I think that, read by those rules, the Act must be under-tood as I But there is another important rule to be borne in understand it. mind in constrain; statutes, namely, that penal Acts are to be construed strictly. This section materially abridges the common law rights of the subject, and visits with penalties those who transgress against it. This reason alone would be decisive against the construction put upon the section. To take qualifying terms from the words to which they primû facie belong, and apply them to others, where they are unnecessary thereby giving the sentence a clumsy form, and to attribute to other words a meaning perhaps wider and more comprehensive than naturally belongs to them, might possibly be justified under special circumstances; but to do all this for the purpose of giving extension to a penal enactment would be contrary to every principle of law and legal construction.

While giving, therefore, every credit to Mr. Plunket for his argument, it seems to me that the Act does not apply to the case which was before him. The conviction consequently must be quashed.



## 28th August 1864.

Before Sir P. B. Maxwell Kut., Recorder. Goh Un Chong vs. Yap Tong San.

An affidavit which contains erasures and interlineations which are not initialed by the Commissioner before whom it was sworn, cannot be read; as such erasures and interlineations must be presumed to have been made after the affidavit was sworn, as otherwise they would have been duly noticed by the Commissioner. A Writ of Sequestration issued against the property of a Defendant will be set aside with cost as against a judgment debt due to another creditor of the same debt, although such judgment be recovered in a Court inferior to the Court from which such Writ of Sequestration issues.

This was an application by Mr. Bernard Rodyk on behalf of one Lim Un a judgment creditor of the Defendant, for a rule nisi on the Plaintiff to shew cause why a Writ of Sequestration issued against the property of the Defendant at the suit of the Plaintiff should not be set aside, at least as against a judgment debt of the said Lim Un of \$28.15., against the Defendant, for two reasons:—1st, The affidavit which stated that the Defendant had left the place, and on which it was granted was not true, as the Defendant was here at the time

of the seizure; (a) and 2nd; the seizure was only under a Writ of Sequestration whereas Lim Un was a judgment creditor of the Defendant. The affidavit on which he made the motion contained several erasures and interlineations which were not initialed by the Commissioner.

The Judge.—I cannot read the affidavits in support of this motion, as they contain erasures and interlineations made, I must presume, since they were sworn, as otherwise they would have been duly noticed by the Commissioner, Re Worthington 5. C. B 511 (b).

On a subsequent day, the affidavirs having been put to rights, Mr. Rodyk renewed his motion and obtained a rule.

On the 16th day of September following, Mr. Logan shewed cause, and contended that the seizure should not be set aside as by the different affidavits filed in this cause it clearly appeared the Defendant was absent; and secondly, the said Lim Un was only a judzment creditor of the Court of Requests and his claim was small, whereas the seizure under the Writ of Sequestration was issued by this Court, and the Plaintiff's claim was much larger than the said Lim Un's.

Mr. Rodyk in support of the rule contended that the Defendant was proved to have been here at the time of the seizure, and such seizure ought to be set aside against the said Lim Un's judgment debt, as that was the higher debt of the two, and the amount was immaterial, and cited Angel vs. Smith 9 Vesey Jr 336., Aston vs. Heron 2. Myl. & K. 390, s c 3 L. J. (N. S.) Ch. 194., Frowd vs. Lawrence 1 Jac. & Walk. 655., Phillip vs. Worth 2. Russ & M. 638, and Onyon vs. Washbourne 14 Jur 497.

THE COURT held that the seizure should be set aside and made the

Rule absolute with costs

<sup>(</sup>a) The Court will not examine an affidavit to see whether it be true or not, or allow the merits to be tried on a counter affidavit, if it be good on the face of it. Nizetich vs. Bonaciob 5 B. & Ald. 904, Vaughan vs. Goadley 3 M & W. 115., Bill vs, Rogers 12. Price. 194. By the Supreme Court Ordinance 5 of 1868 s, 36., a writ of sequestration might now issue although the debtor be present, provided the affidavit states that he is "concealing or otherwise dealing with his property so as thereby to defeat his creditors or the Plaintiff in his said action."

<sup>(</sup>b) The Commissioner need not initial the erasures or interlineations if they be immaterial. In ré Jameso n 8 Dowl. 651.

### 3rd October, 1864.

### BEFORE SIR P. B. MAXWELL, Recorder. KHU POH v. WAN MAT.

This Court can have no jurisdiction in a case where the cause of action arose abroad and the defendant is also abroad.

A vessel having certain goods of the plaintiff on board, was wrecked off a Foreign country where the defendant took possession of them and sent the same to Penang. He himself though born here but had for sometime past ceased to reside here. In an action of trover against him for the goods in which the plaintiff proceeded by sequestration and heard exparte.—HELD, that the defendant being abroad, and the cause of action arose abroad, the Court has no jurisdiction to deal with it and the plaintiff was nonsuited,

The Judge:—This was an action of trover for certain slabs of tin. The defendant was proceeded against by sequestration, and the cause was heard ex parte. It appeared that two years ago a Chinese junk called the Kim What Seng, on a voyage from Tongkah to this island, was wrecked on a bank off Pulo Tengah, one of the Lancawi Islands, which are part of the territories of the Rajah of Quedah. The plaintiff had a cargo of tin on board, and evidence was given that the defendant, with a number of followers, came to the wreck and took possession of a portion of the tin, against the will of the master and crew of the junk. There was also evidence that the defendant was born in Penang and continued to reside here till he was twenty years of age; but that he had ceased for some time to live here. It was said that he was the son of one of the Chiefs of Quedah, and a Punguluh or holder of some other office under the Rajah of Quedah.

Upon this evidence, Mr. D. Logan claimed judgment for the plaintiff; but it does not appear to me that this Court has jurisdiction to pronounce any such judgment.

The question whether the Court has jurisdiction or not depends upon the language of the clause of the Charter which defines its civil jurisdiction; but to understand that language, it is necessary to have correctly in mind the principles by which the jurisdiction of Courts in general is governed and limited, as well as those which govern the interpretation of enactments. Primarily, the jurisdiction of a Civil Court over persons is limited to the persons within its territory. If the cause of action be personal, that is, be a civil injury to person or personality, or a breach of contract, the Court has jurisdiction, no matter where the cause of action arose, if the defendant is within the territorial limits of its jurisdiction. If the matter in dispute be real property, the property also must be within the territory. In the former cases, the venue is transitory, in the latter local. Beyond this, the jurisdiction does not, primarily

go. The general rule (passing over the peculiar cases of judgments in rem, and cases of which Penn v. Lord Baltimore 1 Ves. may be mentioned as a leading one,) is, that Extra territorium jus dicenti impune non paretur.

But the jurisdiction of a Civil Court may legitimately be extended beyond these limits, if the soveriegn power sees fit; and the grounds upon which this may be done have been so lucidly stated by Lord Westbury in the recent case of Cookney v. Anderson, 32 L J. Ch. 427, that it is superfluous to refer to any other authority on the subject. In the first place, it may be extended to all the natural born subjects of the territory of the tribunal, wherever they may be abroad, simply because the duty of obeying the laws of their native country follows men every where; though how far this extended jurisdiction would be recognized by the Courts of foreign countries is doubtful; Story, Conf. L. sect. 540. And next, the jurisdiction of a Court may be extended to all persons abroad. foreigners as well as subjects, in cases where the matter in controversy must under any circumstances be determined by the law of the country of that Court, wheresoever the litigation might arise. "Thus." says Lord Westbury, by way of example, "it is generally agreed by European nations that all questions relating to the ownership of land must be decided by the lex loci rei site, that all questions relating to the succession or administration of the property of a deceased person, whether testate or intestate, belong to the Judge of the domicil of the deceased, and that contracts ought to be applied and interpreted by the law of the place where they are made, and where it is intended that they should be performed. If, therefore, an action or suit be commenced in the Courts of a particular country relating to a matter which, by the consent of nations, is appropriated to the law of that country, it may be right, in order to prevent a failure of justice, to give to such Courts the power of exercising complete jurisdiction, and therefore of citing absent parties under the penalty, if they do not appear, of having judgment pronounced against them in their absence." In such cases, the judgment of the Court so proceeding would, in general, be respected by the Courts of other countries as conclusive on all the parties whether they were abroad or within the jurisdiction. The history of our Courts in England illustrates these principles. Their jurisdiction was until of late years confined to its primary limits. The party liable who was out of the kingdom was safe from all proceedings in them, for personal service of the writ by which they were begun, was necessary, and service could not be legally effected bevond the realm. The Acts of 2 Wm. 4, and 4 & 5 W. 4. referred

to by Lord Westbury, extended the jarisdiction of the Court of Chancery over defendants abroad, when the suit related to land in England, or to charges on it, or to Government stock or shares in public companies there; and the 18th & 19th sections of the Common Law Procedure Act of 1852 extended the jurisdiction of the Common Law Courts to all defendants abroad, whether British subjects of foreigners, when the cause of action has arisen in England, or the contract sued on was made there.

To turn, now, to the Charter under which this Court is constituted :-it authorizes the Court in the first place to determine actions and suits brought concerning (1) any trespasses or injuries of what nature or kind soever, (2) any debts, duties, demands, interests or concerns of what nature or kind soever, and (3) any rights, titles, claims or demands of, in, or to any houses, lands or other things, real or personal within the said Settlement of &c. Having defined the subjects of the Court's jurisdiction, it goes on to state over what persons that jurisdiction is to be exercised, viz: (1) the East India Company, (2) persons who shall be resident, (that is, who are resident at the time of action brought,) within the Settlement; and, as I read the subsequent passage, with the proviso which immediately follows it, (3) persons who have resided in it, and who have debts or property there at the time of action brought. But persons who have never been resident, are excepted from the jurisdiction and so are former residents who have become resident in the United Kingdom, except when the action is brought within two years after the cause of action arose, and the sum to be recovered does not exceed 12,000 dollars. Now, no distinction is here made between subjects and aliens; it is therefore plain that it was not intended to extend the jurisdiction over the former upon the first of the two grounds mentioned in Lord Westbury's judgment. I take it therefore to be immaterial whether the defendant is a British subject, as was urged by Mr. Logan, or not, since a wider jurisdiction has not been given over British subjects than over foreigners.

But, unquestionably, jurisdiction has been given over other persons than those actually within the Settlement; and the question arises, are such persons subject to the jurisdiction for every tort and contract, wheresoever committed or made? Is, for instance, a person abroad who was once resident here, subject to the jurisdiction of this Court for a personal injury committed by him abroad? On general principle he would not; for the question to be determined would be governed not by the law of the tribunal but by the law of the foreign country where the wrong was done, and the case

therefore, would not fall within the principle upon which the jurisdiction can, according to Lord Westbury, be justly extended to all persons abroad, whether subjects or foreigners. If, indeed, the language of the Charter carries the jurisdiction farther, it is the duty of the Court to exercise it. But where the words, taken in their literal or primary sense, would involve a transgression by the Crown or Parliament beyond the powers which legitimately belong to the State. regarded in its relations with other States, some other interpretation must be looked for, if the language will reasonably admit of it, which will avoid a consequence which presumably cannot have been intended. See.ex. gr. R. v. Lewis 26 LJ. MC. 104., Boosey v. Jeffreys 4 II. L. Ca. 815. If, for instance, the clause giving jurisdiction to try "any trespasses or injuries of what nature or kindsoever" were read literally, it would include a trespass to real property abroad, which on acknowledged principles. Courts are not competent to try; Skinner v. The E. I. Co. cited in Cowp. 167, Doulson v. Matthews 4 TR. 503. So, when jurisdiction is given over those who have once been resident in the Settlement, is it intended that those persons shall be liable in all cases whatsoever, or only in those cases which are, in the words of Lord Westbury, "appropriated by the general consent of nations" to the law of the settlement? If the wider and literal meaning were given to the words in both these passages, it would follow that a German once resident in Penang, but now resident in Germany, might be sued here for a trespass upon his neighbour's garden in Hamburg, if it happened that he had property in this Island, or that somebody here owed him a debt. Again, if the word "resident" were to receive the meaning given to "inhabitants" by the Supreme Court of Calcutta in the cases cited by Mr. Logan, a Dutchman who passed twenty four hours in Penang, on his way from Holland to Java, might be sued in this Court if he left his luggage here, for a trespass on land in any other part of the world. Such a jurisdiction does not belong to any Court in England. The defendants would not be liable to be sued there in the two supposed cases even if they were living in England, Assuredly, the judgments in such cases here would never be held binding or be enforced by foreign tribunals, for they are not cases which are appropriated by the general consent of nations to our law

It seems to me that the true meaning of the Charter is that the Court is to have jurisdiction in all civil cases which fall within the cognizance of Courts according to the received principles of English law, and of private international law and it is to have power to cite before it not only those who are within the territorial limits of its jurisdiction, but also those who are absent if they can be cited by

sequestration, in all those cases in which it is recognized by civilized nations that absent persons may lawfully be cited, that is, when the cause of action or matter in dispute is one which according to the principles of private international law must be governed by the law of the Settlement and consequently may be determined in it. The language of the Charter admits of this construction, and that it is the true construction appears to me plain, because a different one would lead to consequences irreconcilable with all principle. In the case before me, the defendant is abroad, and residés abroad; the cause of action arose abroad; and it must be decided according to the law of the place where it arose. Under such circumstances it appears to me that the Court has no jurisdiction to deal with it, and the plaintiff must therefore be nonsuited.



## 21st November 1864.

Before Sir P. B. Maxwell, Knt., Recorder.

Arnashellum Chetty vs. Mahomed Nina Marican & another.

To an action on a Mortgage Bond, Defendants pleaded that no money at all passed between the Plaintiff and them for the making of the Bond but the same was only a nominial mortgage and was ante dated and made to defeat the creditors of the Defendants. Held on demurrer that the plea was bad.

This was an action on a Mortgage Deed. The Defendants amongst others pleaded a plea in the following words, "The Defendants by D. Logan their Law Agent say, that the alleged Deed is written in the Chuliah language and characters, and that a correct translation thereof made by G. W. Symons, the Sworn Interpreter of this Court. is in the words and figures following," that is to say, &c. (setting out the mortgage verbatim) "And the Defendants say, that before and at the time of the making of the said alleged deed the Defendants carried on business as Merchants in Prince of Wales' Island in Copartnership and shortly before the making of the said alleged deed the Defendants lost about Spanish Dollars Thirteen Thousand (\$ 13,000.) by the wreck of the Brig Glory when on a voyage and under charter to them, and the Defendents being then indebted to the Plaintiff and divers other creditors in divers sums of money amounting together to about Spanish Dollars Twelve Thousand (\$12,000), by means of such loss became Insolvent and unable to pay their said debts in full, whereupon the Plaintiff on the 25th day of March A. D. 1863, proposed to the Defendants that in order to protect certain goods of the Defendants of the value of about Spanish Dollars 1,678-25, and certain securities of the Defendants of the

value or amount of Spanish Dollars 594 from being taken in execution by any of the said creditors, and to deceive the said creditors in that behalf and to gain time from the said creditors for the payment of the said debts, the Defendants should make and execute a nominal mortgage of the said goods and securities to the Plaintiff for the nominal sum of Spanish Dollars 2,500. and deliver the said goods and securities to the Plaintiff, and that the Plaintiff should make payments of small sums to each of the said creditors to account of their respective debts in order to induce them to allow the Defendants to continue their said business until they could make an arrangement with their said creditors for the liquidation or compromise of the said debts, and that the Plaintiff should thereupon account to the Defendants for the said goods and securities, and that such deed of mortgage should be ante dated in order further to deceive the said creditors and cause them to believe that it had been executed before the Defendants had become Insolvent as aforesaid, and the Defendants accepted the said proposal and thereupon on the 23rd day of March aforesaid, in pursuance of such illegal and fraudulent agreement between the Plaintiff and the Defendants, the Defendants made and executed the said alleged deed in the Petition mentioned, and dated the same the 20th day of December A. D. 1862, and delivered the same and also the said goods and securities to the Plaintiff, and the Plaintiff received the same in pursuance of the said illegal and fraudulent agreement and the sum of \$ 2.500 in the said deed mentioned was not, nor was any part thereof, paid by the Plaintiff to the Defendants at the time of executing the said agreement or any other time; but the same was falsely stated thereon to have been so paid for the illegal and fraudulent purpose aforesaid." The Plaintiff demurred to this plea. The marginal note of the demurrer being as follows. "A matter of law intend\_ ed to be argued is, that it is not competent to the Defendants, who are guilty of the frand in the said plea mentioned, and who originated the fraudulent arrangement therein set out, to take advantage of the fraud aforesaid, to avoid the covenant therein, pleaded to on the ground thereof." The Defendants joined in Demurrer.

Mr. B. Rodyk in support of the demorrer contended that the plea was bad as the Defendants being parties in executing the fraudulent transfer, could not avail themselves of the Stat. 13 Eliz. c. 5., and cited Hawes vs. Leader Cro. Jac. 270., Steele vs. Brown 1 Taunt 381., Bamford vs. Baron 2 T. R 594., Roberts, vs. Roberts 2 B. & Ald. 367., Bessey vs. Windham 6. Q. B. 166, Montefiore vs. Montefiore 1. W. B. 363, Philpots vs. Philpots 10. C. B. 85., 2 Chitty's Stat 165, Chitty on Cont. 590., Broom's. Com. 281.

Mr. Logan for the Defendants contended that the plea was good as there was no consideration for making the Mortgage Bond.

THE COURT held that the plea was bad, as no man can avoid his own deed by fraud to which he is a party and allowed the demurrer.

Demurrer allowed. (a)

(a) The plea might have been good if pleaded on equitable grounds. See Broom's Com. 290 Dukes vs. Saunders 1 Dowl: 522., Mayne on Equitable Pl. p. 79.; Croley vs. Mc. Callaghan 5 Jr. Eq. Rep. 25.—See also Mootoo Carpen Chetty vs. Ponnesawmy Nayker tried on 16th September 1872, where a pleasomewhat similar was pleaded on equitable grounds.

# Before The Hon. Sir P. Benson Maxwell, Knt., Becorder. Hawah v. Daud.

Mahomedan Married Woman's Personalty \* is her own separate Property, and does not belong to her Mahomedan husband by marital right. The Mahomedan law considered.

Penang Gazette 9th March, 1865.

The petition in this case alleged that the plaintiff, being seised and possessed of real and personal property, married the defendant some years ago. The latter was without property; his occupation in life was that of a police peon. He left the police shortly after his marriage, and until about a year ago lived with his wife, and upon her property. A year ago, he got possesion of her title deeds, gold ornaments and money, divorced her, and turned her out of his house. In his answer, the defendant alleged that the ornaments had been purchased by him, that the money which he had taken was his own and had never been his wife's and he denied the divorce and expulsion. The object of the suit was to recover the property taken and for this purposes that the defendant might be declared a trustee for the plaintiff

THE JUDGE said that he had no doubt upon the facts of the case; and after examining the conflicting statements of the parties, he held that those of the plaintiff were substantially true, and those of the defendant unworthy of credit; except as to the subject of divorce, as to which, he said, it was unnecessary to express any opinion.

He proceeded, then to observe that the legal question which was raised by the petition, was one to which he had often given consideration before this suit. By the law of England, the husband on marriage became seised of the wife's real estate during the marriage, or for his own life, if a child was born alive. He became, further, upon the marriage, absolutely entitled to all her personal effects, and to all the debts owing to her, and other rights, which were

<sup>\*</sup>As to her realty or lands in the Straits, see Cader Meydin v. Shatomah (1868), and Judgment in Reg. v. Willans, pages 83 and 84.

reducible, and which he reduced into possession during the marriage. He became bound, on the other hand, to support her during the marriage, that is, during her or his life. He also became bound for her debts contracted before marriage; but that liability lasted only as long as the marriage; as soon as the marriage was at an end. his liability was at an end also. Whatever might be thought of this state of law, as regarded the wife, it was at all events, the law of a people with whom the Marriage contract was once indissoluble, and if dissoluble now, was only for the greatest breach of it by the wife, or at her express instance, and not by the party, but by a Court of Justice. But according to the Mahometan law and Mahometan usage, marriage was a contract dissoluble at the will and pleasure of the husband, and dissoluble by himself. He had but to pronounce the word and the marriage was at an end. On the other hand, the Mahometan law threw its protection over the wife, leaving her in full possession of all her property, rights and ability to con-To call such precarious unions by the same name as our own marriages, was, perhaps to give one name to two very different things (see Lord Brougham's judgment in Warrander v. Warrander 2 Cl. & F. 448).\* But still, that the Mahometan marriage was a good marriage in the eye of our law seemed incontestable; at all events it could not be contested here, without bastardizing the mass of the population. And the validity of the divorce was equally incontestable. A resumption of cohabitation without re-marriage would be against the Mahometan law and religion, and it could not be enforced by our Courts. The question which then arose was whether the marital rights of a husband over his wife's property were the same in Mahometan marriages as in the indissoluble, or virtually indissoluble marraiges of Christians. If they were, a Malay, under the combined operation of his own religious law, and of the law of the Settlement, was able to strip a woman of all her personal property, and after the birth of a child to keep her real estate, also, for his life, and at the same time to turn her out into the street penmless, absolving himself, by the same step, from liability for her antenuptial debts. If such consequences were the logical result of such a state of law, there were assuredly grounds for pausing before holding that the law was so. It seemed to him that it might be that the Mahometan marriage was a good marriage as regarded its essential character, sanctioning, and legalizing the union of the man and woman, and legitimising their offspring, and yet not be that species of marriage to which the legal incidents as to property. rights and disability attached. Or it might be that if the husband

<sup>\*</sup> Vide Judgment in Reg. v. Willans 1858 page 83.

was at liberty to dissolve his marriage, he became impliedly bound. on exercising that power, to restove his wife, as regarded her property and rights, to the position or condition in which she was before the marriage, or ( what would be the same thing ) to place her in the position in which she would be under the Mahometan law, upon the divorce. It was not, however, necessary in the present case, to determine whether any of these views were well founded; for if the property and rights of the Mahometan wife vested in her husband in the same manner as those of a Christian wife, at law, there would yet be good ground for holding that the man in whom such property and rights become vested by virtue of a contract which he was at liberty to rescind at his pleasure, impliedly undertook to hold them as a trustee for the benefit of his wife, in equity, in the same manner and to the same extent as the Mahometan law gave them, or left them to her, on her entering into the Mahometan contract of mar-Implied contracts and implied trusts were not stratege either at law or in equity. In equity, if one bought and paid for an estate in the name of a stranger, or conveyed it to him without consideration, the latter held it as a trustee for him, or as the expression was, there was a resulting trust in his favour. When freehold land was purchased by partners for partnership purposes, though at law they might be joint tenants of it, equity impressed the property with the character of personalty. When a hu-band died without having obtained administration to his wife, her administrator was in equity a trustee for his personal representative. In these and a multitude of other cases, implied trusts were raised to obviate injustice and meet the presumed wishes of the parties, or what would have manifestly been their wishes if the question had occurred to them. Judge thought that the same principle might be applied to cases like the present. In any view of the case, however, whether the wife's property remained her own at law, unaffected by the common law rules which gave the husband certain rights over it in Christian marriages, which was perhaps the true view, or whether the husband was under an implied contract or an implied trust, it seemed to him ( the Judge ) that the plaintiff was entitled to the relief prayed in her petition. He would therefore order the defendant to deliver up the ornaments and money to his wife, in the same manner as he (the Judge) would have ordered him to do so if they had been settled to her separate use and for her own personal enjoymont, and he should restrain him by injunction from receiving the rents and profits or otherwise intermeddling with the real estate of the plaintiff.

## BEFORE SIR P. BENSON MAXWELL,—Recorder. KHO GUAN CHIAT VS. TAN GIOK LAN.

A deed or contract, and an instrument not under seal should not be altered after being signed and executed, any erasure or alteration made subsequent to the execution of it, will vitiate the contract.

#### JUDGMENT.

In this case a nonsuit must be entered. It was proved that the note or contract sued upon was altered subsequently to the defendant's execution of it, by the addition, without his privity or consent, of the word "Witness" and of the names of three persons purporting to be attesting witnesses to his signature. who were not present when he signed. There was no direct evidence that this was done by the plaintiff or by his direction, but considering that the paper was delivered to him, that he sued upon it, that there was no evidence that it had ever been out of his possession, and finally, that he was not called to offer any explanation, or to contradict one of the alleged attesting witnesses who denied that he had signed the paper or seen the defendant sign it, and who said that he had been urged by the plaintiff to state in Court that he had attested the defendant's signature, I come to the conclusion that the alteration was made by the plaintiff's direction or with his This being so, it is unnecessary to consider whether the alteration was material or immaterial, though I should hesitate much to consider it in the latter light, although the terms of the contract are not altered nor the logal character or effect of the instrument changed. The mode of proving the document was altered by the addition of the attestation clause. for although since the Indian Evidence Act of 1855, it is no longer necessary to call one of the attesting witnesses when the instrument does not require attestation, the regular course is to do so, or if all of them are dead or out of the jurisdiction to prove the document by proving their hand writing. The rule of law as to alterations in documents after their execution is, that if the alteration was made by the party seeking to enforce it, without the consent of the other side, the instrument is vitiated, whether the alteration was in a material or an immaterial particular; and that the same consequence follows, when the alteration is in a material part, although it be made by a stranger. This rule applies not only to deeds (Pigot's case 11 Co. 27) but to instruments not under seal, as, ex. gr. to bills of exchange, bought and sold notes, guarantees, charter parties. ( Master v. Miller. Smith's leading cases, where the cases are collected in the note. ) It is applicable therefore to the instrument here sued upon, which was an agreement by which the defendant in consideration of 300 tickets for a feast delivered to him by the plaintiff, agreed to account to the plaintiff for the proceeds of the sale of such as he sold, after deducting his commission. This rule. which has been frequently recognised and enforced, is said by the Court of Exchequer Chamber, in delivering judgment in Davidson v. Cooper 13 M. & W 352, to be based on the principle "that a party who has the custody of an instrument is bound to preserve it in its original state; " and the Court adds that "it is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part," So, the Court of Exchequer said in the recent case of Croockewit v. Fletcher 26 L. J. Ex. 159. "It is of the most essential importance to the public interest that no alteration whatever should be made in written contracts, but that they should continue to be, and remain in exactly the same state and condition as when signed and executed, without addition, alteration, erasure or obliteration; "and the rule in question is intended to secure this important object. The law will not permit a man, after having tampered with an instrument, to claim the benefit of it in its original state, after he has been detected. If the plaintiff in this case suffers from the rule of law, he suffers from the consequences of his own act. He must be nonsuited.



#### 1868.

Before Sir Wm. Hackett, Judge of Penang.

The ATTORNEY GENERAL of the Straits Settlements.

vs.

## KUM KONG GAY and others.

If A rented a house from B under a lease and remained in it after the lease has expired without a notice from B to quit, the law implies that he holds it under the terms and stipulations contained in the said lease so far as they are applicable to his present tenancy.

The plaintiff brought an action against the defendants as the Opium Farmer of Penang for rent due to Government, the defendants did not dony their debt but contended that they were not liable to pay it at the old rate as they have been injuriously affected by the repeal of the Excise Act under which the contract was made by an Act subsequently passed. Held, that the defendants having continued to use and enjoy the Opium Farm after their contract had become void by the repeal of the said Act and having paid rent for a certain time at the old rate, there was an implied contract on their part to pay rent at the rate reserved in the said contract so long as they continued in possession of the Farm.

This is an action brought by the Attorney General of the Straits Settlements on behalf of the Crown against the defendants for rent alleged to be due by them as the Opium Farmer of this Settlement. The Petition states an agreement between the defendants and the Governor of the Colony, that in consideration of the rights and privileges of the Opium Farmer of the Settlement of Prince of Wales Island, as the same are contained in the Excies Act of 1867, should be vested in the defendants from the 15th day of October until such rights and privileges should cease to be vested in them, the defendants agreed and promised to pay to the Governor, for the use of the Crown, \$ 7850 monthly so long as the said rights and privileges should continue to be so vested in them. The Petition goes on to state that the said rights and privileges were thereupon accordingly vested in the defendants, and the defendants thereupon

became and acted as the Opium Farmer of the Settlement, and continued to be so until the 30th of June 1868, and did from the 15th October 1867 until the 30th June 1868, possess and use all the rights and privileges of such Opium Farmer, yet that the defendants have not paid the rent as aforesaid from the 15th May to the 30th June 1868.

The evidence in the case shows, that by a contract under seal bearing date the 24th April 1867, made between the Local Government and the defendants and reciting that the defendants had been declared to be the Opium Farmer for the terms commencing on the 1st May 1867, and ending on the 31st March 1870, all the rights and privileges of the Opium Farmer of Prince of Wales Island under the provisions of Act XXX of 1866, became vested in the defendants for the said term. These rights are stated in sec. 3 to be the exclusive right of making or preparing opium or chandoo, and also of retailing it in smaller quantities than one chest.

There seems to be no question as to the position of the defendants under the contract I have mentioned. They seem to be clearly entitled to all the rights and privileges of the Opium Farmer of Prince of Wales Island under the provisions of the Act of 1866. The present litigation has arisen out of subsequent legislation.

On the 15th October 1867 Act XXIX of 1867, called the Excise Act of 1867 was passed, totally repealing, without any reservation, the Excise Act of 1866.

Now although the Act of 1867 does not in terms affect the written contract between the Local Government and the defendants, yet there can be no doubt, in my opinion that, in effect, it makes it inoperative, and thus virtually rescinds it.

What does the contract say? and what are the rights conferred by it on the Defendants? They are "all the rights and privileges of the Opium Farmer of Prince of Wales' Island under the provisions of Act XXX of 1866." Once therefore the Act of 1866 has been repealed it appears to me, that there is no longer anything on which the contract can take effect. There is no Opium Farmer, and there are no rights and privileges deriving their force from the repealed Act, and consequently the contract itself becomes inoperative and valueless. The Act of 1867 takes no heed of any interests which may have vested under the former Act. It repeals it in toto. It only provides for contracts to be entered into under the new Act, without any mention or reservation of contracts already existing, possibly because it regards them as virtually recinded (secs. 2 and 4 Excise Act 1867 and sec. 82, repealing the Act of 1866.)

Whether the defendants have been injuriously affected by the repeal of the Act of 1866 and the passing of the Act of 1867 I have not

now to inquire, nor have I to decide whether they have reason to complain of any breach of the original contract between them and the Local Government. The question I have now to determine is whether in the events that have happened since the 15th October 1867, any contract can be implied on the part of the defendants to continue to pay the rents they were bound to pay by the contract of the 24th April.

The Act of 1867 as I have already said, in my opinion, puts an end to the written contract of the 24th April, and when that Act was passed if the defendants thought themselves aggrieved, they should have then asserted their rights :- that would have been the moment for putting an end to their tenancy or repudiating their contract. They might have said, for instance, that they had taken the Opium Farm under the Act of 1866, and as the conditions under which they entered into the contract had been altered, they did not consider themselves any longer bound by it. But they did not do so. They continued in possession of the Opium Farm from the 15th October 1867, the date of the new Act, until the 30th June last; nay more, it appears from the receipts produced and it is not denied by the defendants, that they continued to pay rent at the rate originally agreed on up to the middle of the month of May last. The case therefore seems to me to resemble in principle those cases of tenancy of land. where, when a man occupies premises under an agreement or under a void lease, or continues to hold over and pay rent after a former lease has expired, the law implies that he holds under the terms and stipulations contained in such agreement or lease so far as they are applicable to his present tenancy.

In the present case the defendants having continued to use and enjoy the Opium Farm from the 15th October 1867, when their written contract came to an end, and having paid rent at the old rate, I think that there was an implied contract on their part to pay rent at the rate reserved in the written contract so long as they continued in possession of the Farm.

Judgment must therefore be given for the plaintiff.

==000000000c

#### 13th July 1868.

Before SIR WM. HACKETT, KNT., Judge of Penang. Kader Meydin, Administrator of Hossansah vs. Shatomali.

A Mahomedan married woman must in accordance with Indian Act XXXI of 1854 acknowledge all assignments of her realty situate in the Colony and the husband must join in such assignments or his absence accounted for.

This was an action of Ejectment in which Judgment had been given for the Plaintiff. The matter was re-argued last year and the original Judgment affirmed. The question was whether an assignment by a Mahomedan married woman of her realty in Penang unacknowledged by Deed in conformity with Act No 31 of 1854, and without the concurrence of her husband, was a valid conveyance.

- B. Rodyk for the Defendant contended that as the Court had decided in Hawah v. Daud (a) that Mahomedan married women were entitled to their own property to their sole and separate use, it necessarily followed that the incidents appertaining thereto must also be granted to them and cited Taylor v. Meads, 34 L. J. Ch. 203. Adams v. Gamble, 11 Irish Ch. Rep. 269. Lechmere v. Brotheridge, 32 L. J. Ch. 557. Haynes' Outlines of Equity. 2 Ed. 228.
- D. Logan Solicitor General, for the plaintiff, contended, that the lex situs, the law of the land, must govern all such questions as to realty, and cited Story's Conflict of Laws. 363 & 435.

THE JUDGE held that every married woman, whatever her creed or race, must conform to the Act, and in conveying lands situate in this Colony they must obey the law of the land: that the native wives are bound by the same law in such matters as other married women and that it would be contrary to public policy to allow of any such departure from the rule as had been contended for. (b) If the husband were absent the wife should apply to the Court, who whould see that justice was done. (c).

(a) Vide ante page 253. (b) See Chulas and another vs. Kolson binte Seydoo Malim (Malacca case) tried in March 1867; also see Story's Confl. Laws, § 341, 463. (c) See a cross action in equity, Shatomah vs. Kader Meydin, tried on 16th February 1870.

### NOTIFICATION.—No 147.

The 8th September 1864,

Under the operation of Section VII of Act XXXI of 1854, the Magistrates of Police of Prince of Wales' Island and Province Wellesley, and the Registrar and Senior Sworn Clerk of the Prince of Wales' Island, Division of the Court of Judicature, have been appointed ex-officio Commissioners to take the acknowledgment of deeds by married women.

The attention of the Commissioners is called to the following Sections of the above-mentioned Act:-

ons of the above-mentioned Act:Section VIII. Every such Judge, Officer, or Commissioner as

Such married woman to be examined apart before Judge. &c., taking her acknowledgment. It is a considered and shall ascertain whether she understands its object, and freely and voluntarily consents to the same, and unless she appears to understand its object and freely and voluntarily to consent to such deed, he shall not permit her to acknowledge the same, and in such case, such deed, so far as relates to the execution thereof by such married woman, shall be void.

Section IX. Every Judge, Officer, or Commissioner taking such Judge, &c., shall sign a Memorandum of nettine of taking the same, sign a memorandum to be endorsed on or written at the foot, or in the margin of such deed, which memorandum shall be to the following effect namely. "this deed marked ( ) was this day produced before me and acknowledged by therein named, to be her act and deed, previous to which acknowledgment the said

was examined by me separately and apart from her husband, touching her knowledge of the contents of the said deed, and her consent thereto, and appeared to understand the same, and declared the same to be freely and voluntarily executed by her."

By Order

M. PROTHEROE,—Lieut,

Deputy Secretary to Government,

Straits Settlement.

16th July 1868.

Before Sir Wm. Hackett, Knt, Judge of Penang. Kena Moona Verrapa Chetty vs. Jean Joseph Ventre.

'Action on Bottomry Bond against Defendant as surety, loss of ship through the ignorance of the master and drifting by tide. Held, no deviation as it was not a voluntary act.

SEMBLE.—The law of the Flag (French) must prevail in all questions of seaworthiness.

THE JUDGE.—This was an action brought by the plaintiff to recover the sum of \$4000 with interest lent by the plaintiff to one Joseph Charles Anglès for whom the defendant was surety, and the facts of the case are as follows:—

In the month of January 1866 Joseph Charles Anglès who was master, and part owner of the French ship Charles Julie borrowed \$4000 from the plaintiff, and in consideration of the loan, the defendant joined Anglès in executing a Deed upon which the present action is founded. By this deed,—which recited the loan to Anglés for twelve calendar months, on the under-

standing that the Charles Julie might during that period be employed in vovages from Penang to Rangoon and back, and to Singapore and back, and should eventually return to Penang, within the aforesaid time, the defendant and Anglés jointly and severally covenanted, that the said vessel would not go on any other voyages, or deviate from those authorized by the said Deed, (the perils of the seas &c, excepted) and should return to Penang at the stipulated time. Then there was a covenant, by the defendant and Anglés for payment of the principal sum with interest at 2 per cent per mensem, ten days after the arrival of the vessel at Penang from the last of her voyages, and a proviso, that if she should previously have been totally lost, the principal and interest should not be payable to the plaintiff. And as a further security Anglès assigned his interest in the Charles Julie to the plaintiff.

The plaintiff in the first count of his petition alleged that the "vessel without sufficient cause deviated from the said voyage and never went to Singapore whereby the said bottomry bond was determined, and the said \$4000 became immediately due and payable by the defendant to the plaintiff." The defendant to the first count pleaded that "the said ship did not deviate from the said voyage to Singapore as alleged," and upon this plea issue was joined.

From the evidence it appeared that the Charles Julie. a three masted schooner sailing under French colours, left Penang on a voyage to Singapore on the 22nd February 1866. Including the master ( J. C. Anglés ) there were ten seamen on board. The vessel proceeded on her voyage without accident until the morning of the 25th February. On that morning between three and four o'clock land was seen on the Port bow, which the Captain and first mate supposed to be Pulo Cocob, an island in the proper channel, and which, supposing the vessel to be in her right place would have been seen on the Port bow. The vessel then appears to have been steered to the south for about four miles "to take" as the Captain said, "the mid channel so as to round Cocob island and the land." He then goes on "Convinced that I was in the channel between Cocob and the Carimons the breeze having slackened, .I ordered to steer to the S. S. E. -S. E. and S. E. & E., trying to come to Port as much as the land allowed me, so as to take afterwards the direction of the E. S. E. in order to sight Coney Island which was to lead me to the Straits of Singapore where I was going at day break about 6 a. m. without having taken any rest, watching the lead, going up the mast myself with my spy glass, ordering my mate and my second mate to go there also, I saw through the morning haziness the land on the starboard, I supposed it to be the Carimons, and in the East I saw small Islands rather distant. I came up the mast again to look about trying to see the light of Coney Island, when I observed a change in the colour of the water at a small distance; the looming had already altered the appearance of the land. It was about 7 a. m. I immediately ordered to take in sails and to let go the anchor, but at the same moment my vessel had three violent shakes having struck on a shoal covered by the sea "-Having been asked what he did when the ship struck, he replied. "I immediately ordered to sound the pump and found at first one foot of water in the hold-the vessel was fast a-midship. I ordered to sound at the stern and found four feet in the hold. I immediately ordered to lower the boats, to free the mainhatch for throwing cargo over-board to lighten the vessel, but the water was rising in the hold.—the vessel was burst, the water was on deck \* \* \*. Then the vessel had a list to Port, and sunk fast. I remained on board the last and left the vessel when urged by my crew to do so \* \* \* . I only

knew where I was through a Malay of the name of Said, who came near the vessel at the moment of the wreck and of whom I asked where was the Great Carimon and which he pointed out to me to the Northward. I then perceived the error caused by the currents. I believed the Great Carimon was to the South. I was not able to perceive the error myself, navigating with a chart ending at the beginning of the Great Carimon. The error was then evident. I had been brought by the influence of the currents in the Straits formed by the island of Pulo Panjang and the Great Carimon, a channel parallel to the one I wanted to take; and which I thought I had taken, viz: the one formed by Cocob Island and the Carimons, and which would have led me to Singa-The evidence of the Captain is in substance corroborated by the evidence of the first and second mates, and as regards what took place immediately before the ship struck, it is confirmed by the evidence of some Malays who, from the shore, saw the vessel strike. A number of witnesses were examined on behalf of the plaintiff to show that there are no currents in those seas which would account for the course which the vessel took and to prove that with the most ordinary care the vessel could not have got into the position in which he was when she struck. On the other hand the defendant examined witnesses who testified that there was a current in the Straits which might have carried the vessel out of her course in the direction in which she The result of the evidence on this point in my opinion is this .-That there probably was a current or tide setting to the southward between. Pulo Panjang and the Great Carimon, but that a vessel navigated with ordinary care and skill could not have been carried out of her proper course by the force of this current without the deviation being perceived, and therefore that the Charles Julie could not have drifted to the shoal on which she was wrecked except through the negligence or unskilfulness of the master and crew.

Now the plaintiff contends that the departure of the vessel from the proper and ordinary course of the voyage was a deviation within the meaning of the covenant against deviation contained in the deed, and that for the breach of this covenant he is entitled to recover the principal sum of \$4000 together with interest. And the question arises, was this departure from the ordinary channel in the voyage from Penang to Singapore, a deviation within the mean-of the covenant? I take it for granted that I may summe that the covenant not to deviate contained in the deed is to be construct in the same sense in which the condition not to deviate which is implied in Policies of Marine Insurance is understood.

Now on referring to the text writers on Marine Insurance whose works I have been able to consult, I find the following definitions of the word "deviation."

Park defines it, as, "a voluntary departure without necessity or any reasonable cause from the regular and usual course of the specific voyage insured" ( Park on Ins. 8th ed. p. 619.)

Marshall states; "By deviation is meant a voluntary departure without necessity from the usual course of the voyage insured" ( Marshall on Ins. 4th ed. p. 138).

Arnould's definition is more full than either of these. He says: "The true proposition, therefore, is, that every voluntary and unnecessary departure from the prescribed course of the voyage, by which the risk is varied, is a deviation whether the risk be thereby aggravated or not." (Arnould on Lis. 3rd ed. p. 426). Further on he says: "Moreover it must be a voluntary departure from

the usual course of the voyage in order to be a deviation; but it will be so considered although it takes place through the gross ignorance of the captain "citing Phynn. vs. R yal Exch. Ass. Company 7 T. R. 505. (I bid in end pag.) This last proposition is relied on by the plaintiff in support of his claim, and he contends that in-as-much as the Charles Julie departed from the proper and usual course of the voyage through the gross ignorance of the master there was a breach of the covenant not to deviate, even although the master may have thought he was proceeding in the proper course.

But, in my opinion this is not a correct view of the author's meaning:—the whole passage must be read together; and I think it is clear that the act done in ignorance which constitutes a deviation must be a voluntary act, and not a mere error of judgment. Nor does the case of Phynn v. Royal Exch. Ass. Cobear out the proposition contended for by the plaintiff. In that case a vessel bound from London to Jamaica was carried by currents and other causes out of her reckoning until she was found to be between the Grand Canary and Teneriffe. From this point her direct course to Jamaica was to the South West, but the Captain bore up for Santa Cruz about 30 miles to the North West, where he came to an anchor. There the vessel was seized and condemned as prize.

Here therefore we have a distinct voluntary departure from the proper course of the voyage after the master had fully ascertained his position, and from the report of the case, it seems to have been taken for granted that although the master lost his reckoning and got out of his course, there was no deviation until having ascertained where he was, he voluntarily shaped his course for Santa Cruz.

But in the case before the Court the master got out of his reckoning and never found out his mistake until after the vessel had struck;—there was no intention on his part to go between the Carimons and Pulo Panjang, and therefore the case does not resemble the one just referred to.

There is another case which was referred by the counsel for the plaintiff, that of Tait v. Levi (14 East, 481) in which the captain of a vessel insured to a port or ports on the Spanish Coast not higher up than Tarragona went into Barcelona mistaking it for Tarragona. This case is cited as a case of deviation. But although there is a passage in Lord Ellenborough's judgment from which it appears that his Lordship thought this might be a case of deviation, yet in the opinion of the majority of the Judges of the Court it was not considered a case of deviation because it was not voluntary, and the underwriters were held to be discharged on the ground that there was a breach of the implied warranty to provide a Captain of sufficient knowledge for the purpose of the voyage insured. This case therefore rather supports the proposition that an involuntary departure from the ordinary course of the voyage through the ignorance of the master does not consitute a deviation, and that to constitute a deviation the departure must be voluntary. And indeed it seems to me that any other doctrine would be attended with absurd results, and it would come to this that in every case in which a vessel struck on a rock or sandbank through the ignorance and unskilfulness of the master there would be a deviation in-as-much as such rock or sandbank must necessarily be out of the proper course of the voyage.

I am of opinion therefore that there has been no deviation in this case within the meaning of the covenant not to deviate from the voyages stipulated and authorized by the deed, and that the plaintiff is not entitled to judgment on the 1st count of his petition.

The plaintiff further contends that, in any case, he is entitled to recover on the count for money had and received, on the ground of a breach of the warranty of seaworthiness which must be implied in the contract; that this warranty not having been complied with there was a total want of consideration and therefore that he is entitled to be repaid the money he has lent.

The grounds of unseaworthiness alleged by the plaintiff are three :-

First the ignorance and incompetence of the Captain;

Secondly, the insufficiency, of the crew; and Thirdly, the want of proper and necessary charts on board the vessel.

Now assuming a warranty of the seaworthiness of the ship to be implied in the contract between the parties, and that on the event of a breach of this impled warranty the plaintiff would be entitled to recover back his loan on the count for money had and received, I proceed to consider the evidence on the various breaches alleged by the plaintiff,

'First as to the alleged incompetency of the Captain. I quite agree to the contention on behalf of the plaintiff that there is evidence to show negligence or ignorance on the part of the Captain, and that it is difficult to conceive how he could have got into the position in which the vessel was lost with ordinary care and a competent knowledge of his duties. And if this were the case of a British ship, prior to the 13 & 14 Vict. c. 93, upon the evidence I think there might be strong reason for contending that the Captain was not competent. This was so in the case of Tait v. Levi which I have already mentioned where the evidence showed that the Captain was incompetent and the underwriters were discharged. At the time however that case was decided there were no requirements by the English law as to the fitness and capacity of masters, and it may be doubted whether since the Merchant Shipping Act, the question could well arise. By the Act, Marine Boards are constituted for the examination of masters and mates of foreign-going ships and of home-trade passenger ships. The examination is under the control of the Board of Trade, and when it has been passed, the Board of Trade grants to the applicants a "certificate of competency" either as master, first, second or only mate of a foreign going ship, or as master or mate of a home trade passenger ship, as the case may be. If then this were the case of a British ship all that, in my opinion, the Court could look to in any allegation of unseaworthiness on the ground of the master's incompétency would be the "certificate of competency" granted under the provisions of the Merchant Shipping Act. (see Merchant Shipping Act 1854 Sections CXXXV & CXXXVI.) If the master were properly certified under that Act, I do not think evidence of his conduct would be admissible to show that he was incompetent.

Bnt this is not the case of a British ship. The Charles Julic was a French ship—built in France—with a French master and crew, and it is clear that any question as to the competency of the master or the sufficiency of her equipment generally must be decided by the law of France. As Willes J. observed in Lloyd v. Giubert, (Law Rep. Q. B. vol. I. p. 127.)—"With respect to all persons, things and transactions on board, she was, as it were, a floating island, over which France had an absolute, and for all purposes of peace as exclusive a sovereignty as over her dominions by land."

Now what is the French law with regard to masters of merchant ships? There was no evidence adduced expressly on the subject, and the absence of such evidence may be accounted for by the fact of the plaintiff resting his claim mainly on the ground of the deviation of the vessel from her proper course. But

263

there is evidence from which 1 think it may be fairly presumed that the requirements of the French law as to the qualifications of master have been complied with.

A commission was issued out of this Court to Marseilles for the examination of witnesses and under that commission Captain Anglès was examined. He there stated "that he was a master mariner for navigation on all seas; and that he had passed a practical as well as a theoretical examination after which a certificate of master mariner for navigation in all seas was granted to him in 1854." In a subsequent part of his evidence Captain Anglès states that after the loss of the Charles Julie and his return to France "he passed in compliance with the French law before several Courts composed of competent men who have entirely absolved him, and have left him his certificate and the power to continue to command,"

Doubtless it would have been more satisfactory if the point had been properly raised between the parties, and the provisions of the French law established by proof in the usual may, but I must deal with the evidence as I find it, and considering that the evidence of Capt. Anglès is not contradicted I feel bound to presume that he is a properly certificated master according to French law, and therefore that in any question of seaworthiness evidence of his conduct during the voyage cannot be adduced to prove his incompetency.

The second ground of unseaworthiness alleged by the plaintiff is the insufficiency of the crew .—

The only evidence we have on the question of the sufficiency of the crew is that of the master and the first and second mates of the Charles Julie.

Captain Angles states as follows:—"I had a mate, a second mate and a boatswain, and a crew of six \* \*. She (the vessel) was a three masted schooner, being so easily manned \* \* \*. I had only three square sails and all three at the foremast \* \*. They (the crew) were more than sufficient (to man the vessel) according to what I have just stated."

Amedee Aubert the mate states: "We were ten hands altogether on board-The officers were, the captain myself and the second mate \* \* \*. In difficult circumstances besides the man at the cathead and the customary watch, orders were frequently given for some one to go up the masts."

Felicien Perrache on this point says :

"There was a sufficient crew for manning the vessel considering the vessel was a three masted schooner and that the only heavy work was in moving the square sails."

This being the only evidence in the case with regard to the number and sufficiency it is clear that there is nothing from which I should be justified in assuming that the crew was insufficient.

The third ground of unscaworthiness alleged is the want of proper and necessary charts on board the vessel.

From the evidence of Captain Anglés, it appears that the chart used on board the Charles Julie is the chart published under the direction of the Secretary of State for the French Navy in 1862. A copy of this chart was produced before the Commission at Marseilles and is the chart marked No. 2 in the documentary evidence. It is designated "Carte du Detroit de Malacca (Partie Sud) Depuis Les North Sands Jusqu'à Singapour d'après M. M. Wm. Rose, Robert Moresby et C. Y. Ward de la Marine Anglaise de 1' Inde," "Chart of the South part of the Straits of Malacca from the North Sands to Singapore, according to Messrs W. Rose &c. &c. of the Indian Navy." From its title therefore the chart

purports to be the authorized chart-of that portion of the Straits of Malacca in her voyage through which the Charles Julie was lost. And there is further evidence of this. The mate Amedee Aubert states—"The chart made use of is the chart of the Straits of Malacca from the Depôt of the French Navy" and Louis Honore Gilette a retired Captain describes the chart in question as "a new and more complete edition of the one published by order of the Minister of the Navy which I used, and which is used by French captains to go to Singapore. It enables me to see the navigation which is to be made in the Straits of Malacca."

It would appear therefore that the chart used is that published by order of

the Minister of the Navy and used ordinarily by French Captains.

But a chart was produced before the Commissioners on the examination of witnesses at Singapore, an English chart, which appears to be a more complete chart than the French one and it is contended on behalf of the plaintiff that because the Charles Julie was not provided with a chart as perfect as this English chart—therefore she was uuseaworthy.

Now on examination of these two charts it is clear that as compared with the English chart, the French one is imperfect, and must necessarily be less serviceable in navigating those waters. Besides it appears from the evidence of the Captain and mate that the place where the Charles Julie was wrecked was altogether out of the range of the French chart which therefore at that point became useless. Whereas the English chart which extends a third of a degree more to the Southward includes the spot of the wreck.

But it seems to me that all that was requisite was that the Charles Julie should have on board the chart stamped with the authority of, and prescribed by, the French law. It would be most unreasonable to hold that, as regards her equipment, a vessel should be governed by any other law than that of the state to which she belongs.

I am therefore of opinion, that the plaintiff has failed to establish the third ground of unseaworthiness, namely, the want of proper and necessary charts.

The result of the whole is that there must be judgment for the Defendant.

### 17th. September 1868.

BEFORE HIS HONOR SIR WM. HACKETT, Judge of Penang.
W. E. MAXWELL, Administrator &c. of Nullah Mahomed deceased
vs.

## Chittyappah Chitty.

Mortgage of a Hackney carriage not in a regular form, and agreement to sell is not stated. Sale by mortgages upheld. Judgment for defendant.

THE JUDGE—This is an action of trover to recover the value of a carriage. Plaintiff is the administrator of one Nullah Mahomed The facts appear to be as follows. In January 1868, the plaintiff's intestate borrowed money from the defendant and gave him certain papers as a security for the loan. On the 29th February the intestate died and about the 20th of April, the defendant sold the carriage, and it is for this act that the action is brought.

Defendant sets up his title as mortgagee and claims a right to sell under the promissory note of the 1st February.

The promissory note was as follows—"I Nullah Mahomed promise to pay to Chittyappa Chitty or order the sum of Spanish Dollars Fifty (\$50) payable by monthly instalments of the sum of Spanish Dollars Six (\$6), if default should be made in paying any of the said instalments the whole shall become immediately due and payable, and for better securing the repayment I hereby mortgaged to the said Chittyappa Chitty one carriage No. 92 and one black pony with harness complete"

The plaintiff, on the other hand maintains that there was no mortgage, because the promissory note was not an instrument under seal and no property in a chattel can pass without delivery unless the gift be by deed, and in support of his argument he cites the case of *Irons* v. *Smallpiece*, 2 B. & Alderson.

Now this is no doubt perfectly true with regard to gifts of chattels which are invalid without a delivery of possession, in the same way as a donation mortis causa passes nothing unless the gift be completed by delivery, but it is not so in the case of a contract where there is a valuable consideration. Otherwise no contract for sale of goods would be binding unless it were by deed or unless there were actual delivery of the goods.

The case of Flory v. Denny shows conclusively that the mortgage of a chattel may be made without deed. I am therefore of opinion that this objection cannot be sustained.

Then comes the question does this promissory note or agreement amount to a mortgage? The document is certainly a most informal one and contains none of the proper or usual words of assignment. It only contains the words "mortgage", and that too is used (no doubt by mistake) in the past tense. Now properly speaking "mortgage" is a word expressing in law the effect of an assignment or conveyance of a particular kind, and is never used by lawyers to express the act of assignment. But here I have a document drawn by an unpractised hand and I am to endeavour to extract the real meaning of it. If the parties from ignorance failed to use the proper or usual words, am I to say that their contract is not to be carried into effect? I think not. If the Court is satisfied from the document itself, that the parties intended to make a mortgage, I think it is bound to effectuate their intention, although perhaps the most correct and grammatical language may not have been used.

In this case, I think, it was clear from this note that the intention of the parties was that the palanquin and pony should be mortgaged to the defendant as a security for his money, and I consequently feel bound to hold that the palanquin was in fact so mortgaged.

The next question is what were the rights of the defendant in the events which have happened? Had he a right to sell, and, if he had no right to sell, can the plaintiff maintain the action for the conversion of the goods?

Now the terms of the note are, that Nullah Mahomed shall pay off the loan by monthly instalments of \$6, and that, in the event of one monthly instalment being unpaid, then the whole amount shall become payable. Ordinarily speaking in assignments by way of mortgage there are stipulations as to the circumstances and conditions under which the mortgagee shall be entitled to take possession of and dispose of the mortgaged property. Here there are no such stipulations, and we have the bare fact of the mortgage to the defendant without anything more.

Now in the absence of any stipulation to the contrary a mortgage would entitle the mortgage to immediate possession of the mortgaged property. A mortgage is an assignment of the property in anything subject to a condition or proviso that if the debt is discharged by a certain day the transfer should be void, and the only right remaining in the mortgagor (unless there are provisions for his retaining possession of the mortgaged property, in which case he may be a lessee) is his right of the equity of redemption. In this case, therefore, there being nothing stipulated to the contrary, the defendant had a perfect right to the possession of the mortgaged palanquin until his debt was satisfied.

Then the question comes had the defendant a right to sell? and if he had no right to sell does the act of the sale operate so as to revest the right to the possession of the mortgaged property in the mortgager or his representatives? I think not. At law the title of the mortgagee to the possession of the mortgaged property is absolute unless there be some special clause in the mortgaged deed by virtue of which the mortgager is entitled to claim possession, and even in the case of a pledge in which the property does not pass, it had been held in the case of Donald v Suckling and the recent case of Halliday v. Holgate that the pledger is not entitled to bring trover as long as the debt for which the property was pledged as security remains unpaid. A Fortiori this must be so in the case of a mortgage in which the legal estate in the mortgaged property is vested in the mortgagee, and the only right or interest remaining in the mortgagor is the equity of redemption.

I express no opinion here as to whether the sale was regular or otherwise. It is laid down in the books that the mortgagee of a

chattel may sell on giving notice to the mortgagor. In this case at the time of the seizure and sale, the mortgagor was dead and had no legal personal representative. There was therefore no person to whom notice could have been given, and it may be that the sale was thus irregular. But the question cannot arise in the present suit. The rights of the mortgagor other than those which he has by special agreement are purely equitable and are not cognizable in a Court, of law. If, therefore, the interests of the mortgagor have been prejudiced he must seek for redress in another manner.

I may mention that it does not appear to me from the evidence that the representatives of the mortgagor have been prejudiced. There is no reason to believe that the property was not sold to the best advantage, and in point of fact there is still a considerable balance due to the defendant. Under any circumstances, therefore, according to authority of Brierley v. Kendale, and Johnson v. Stear, the plaintiff, even if he were entitled to judgment in his favour, could only claim nominal damages.

I think, therefore, that law agrees here with equity in giving judgment for the defendant.

## February, 1869.

BEFORE SIR WM. HACKETT, KNT., JUDGE OF PENANG.

VADAMALIA PILLAY V. SHETTHAY AMAH.

This Court has no Jurisdiction on its civil side to entertain suits for restitution of conjugal rights amongst Hindoos.

This was a suit instituted on the civil side of the Court by a Hindu husband against his Hindu wife for restitution of conjugal rights. The woman pleaded cruelty and violent assault. There was no evidence as to the duties of husband and wife according to Hindu law.+

His Honor the Judge held that the Court had no Jurisdiction in such cases, and referred to Hyde v. Hyde and Woodmansee, 35 L. J. P. & M. 57.

† See I and 2 Strange's Hindu Law, as to its being a criminal offence by that law.



# 15th September, 1869.

BEFORE SIR WM. HACKETT, Judge of Penang.

Rozells versus Che Dean.

An action for slander in the words following "you are a great rogue, a great thief, you are a beggar and I consider you to be equal to" &c, is not maintainable without proof of special damage.

This was an action for slander spoken in the Malayan language as follows, "Loo ada besar satu panchuri, hang bangsat punia orang, aku sama hang sama" &c. The declaration alleged that by means of such slander the plaintiff was injured in his credit and reputation as a trader without alleging any further damage. The defendant pleaded the general issue. No special damage was proved.

Mr Logan for the defendant contended, that the words were not actionable without proof of special damage, and that the case fell with the class of cases known as "damnum absque injuria" and the action could not be maintained.

Mr Bond for the plaintiff contended, that the words, especially "you are a thief," were actionable without proof of special damage and cited Munis vs. Leford, Cro. Jac. 134., Showel vs. Haman Cro. Jac. 154., Thomson vs. Carle Cro. Jac. 162., Roberts vs. Cauder 9 East. 90.

THE COURT HELD, that the words were not actionable without proof of special damage and gave judgment for defendant with costs.

# 21st December, 1869.

BEFORE HIS HONOR SIR WM. HACKETT, Kt., Judge of Penang.
WALTER SCOTT LORRAIN & ors. vs. NEO LEANG & ors.

If A sells goods to B. and the memorandum of sale is silent as to whether the sale is by sample or not, parol evidence is not admissible, to shew that it was a sale by sample.

In the case of a sale of damaged goods the maxim careat emptor applies as by the terms of the bargain, the purchaser has notice of the defect and has an allowance made him for it, and it is his own fault if he does not sufficiently protect himself against the risks incidental to such a purchase. In all cases where the purchaser is satisfied without requiring a warranty, in the absence of fraud, he must bear the risk.

Where goods are sold by sample, and on delivery but before acceptance they are found not to correspond with the sample the purchaser might in that case, if the right of property has not passed to him, be justified in returning the goods.

THE JUDGE,—This is an action brought to recover the sum of \$3020— with interest from the 12th of August last, for breach of an alleged promise to sign a promissory note for that sum, being the price of 30 packages of Turkey Red Twist bought of the plaintiffs by the defendants. The defendants have depied the promise as alleged.

According to the evidence for the plaintiffs, the first named defendant (a partner of the other defendants) went to the plaintiffs' godown on the 9th August, and purchased two bales and twenty eight cases of Turkey Red Twist at \$110 per case or bale. One of the cases was opened at the time, and being found to be mildewed, two other cases were opened and were found to be similarly damaged. On discovering this, the defendant refused to accept the goods and the contract was accordingly cancelled.

The plaintiffs' salesman seems to have had the mildewed Twist dried in the sun and brushed, and having thus improved its appearances, three days after the transaction I have mentioned (on the 12th of August), he sent for the defendant Neo Leang to see if they could not come to some terms about the damaged goods. The defendant came and inspected the yarn in its improved state, and after some discussion consented to take all the 28 cases at the former price, in consideration of an allowance being made of \$10 per case for mildew. A memorandum of the sale was written in the plaintiffs' sales book, stating that the goods (specifying the 28 cases) were sold to Neo Leang, at the rate of \$110 per case, less \$10 per case for mildew—terms 3 months, which memorandum was signed by the defendant, Neo Leang.

This was the contract as it appeared from the written memorandum, and further, the plaintiffs' clerk, Mr. Tolson, who effected the sale, states positively that he did not warrant the condition of the goods in the unopened cases, and that it was impossible he should have done so, inasmuch as he had no means of knowing the state of the contents. He says, that he made an allowance for damage, as set forth in the written memo: without qualifying the extent of the damage. He also denies that he ever said that the three cases which had been opened were a sample of the remainder. In opposition to this the defendant, Neo Leang swears that, there was an agreement that the remainder of the cases should be as little damaged as the opened cases.

The goods were delivered to and received by the defendants in due course. But when they came to examine the yet unopened cases, some of them were found to be so much damaged, and some of them so utterly worthless, that the defendant Neo Leang begged of the plaintiffs to make him a further allowance. Some negotiations then took

place between them to which, inasmuch as they were fruitless, it is unnecessary to refer particularly. And on the 24th August, Mr. Bond, the defendants' attorney, wrote to the plaintiffs, requiring them to take back 24 of the cases on the ground that they did not correspond with the sample. Four days after that notice, the present action was brought.

It is contended by Mr. Bond, on behalf of the defendants, that the sale in this case was a sale by sample, and further, that the plaintiffs warranted the remainder of the goods to be of the same quality, that is to say, as little damaged as the opened cases, and the other cases proving when opened to be much more damaged than the samples, that the defendants were justified in returning them.

But are there any circumstances in this case from which it can be collected that the plaintiffs intended to guarantee that the unopened cases were as little damaged as the opened ones. Because, the warranty insisted on by the defendants is not the ordinary warranty that goods are of a certain quality or description, but it is that goods supposed to be damaged were not damaged more than certain other goods.

Now, in this case there was a memorandum or entry in the plaintiffs' sales book, containing the terms of the sale and signed by Neo Leang and which must be looked on as the contract between the parties.

It is true that Mr. Tolson states, that he did not read over this memo: to the defendant, but still I think, it must be assumed that he was aware of its terms, for he states, that Mr. Tolson, after they had agreed on their bargain, wrote something in a book, and he goes on to specify what was thus written, namely, "2 bales and 28 cases at \$10 per case—with an allowance of \$10 on each case," which, as has been seen were precisely the terms of the written memo: I think therefore that I am justified in taking this to be the contract between the parties. Now this memorandum is quite silent as to any warranty, there is no mention whatever of any sample, it merely states the price of the goods and the allowance of \$10 per case for mildew, generally.

Assuming therefore, for the moment, the defendant's statement to be true that he only agreed to buy the goods on the understanding that they were of the same quality as the three opened cases, yet as there was no mention made of this stipulation in the written contract, it seems to me that parol evidence cannot be admitted to show that it was an essential part of the bargain.

In Meyer v. Everth 4 Campb. 22, it was held that if the sale note do not contain a stipulation that the goods are equal to a sample,

parol evidence to prove it is inadmissible. It was also determined in Gardiner v. Gray, 4 Campb. 144, that if, before or at the time of sale, a sample of goods has been exhibited to the buyer, but the written contract merely describes the goods as of a particular denomination, this is not a sale by sample.

But, as a matter of fact; I really do not see how there could have been a sale by sample in this case, in the ordinary meaning of the term. It was not an ordinary sale, but a sale of damaged goods, and one in which I see nothing to take it out of the general rule in matters of bargain and sale of caveat emptor. One would rather say that in purchase of damaged goods, this rule ought, if ever, to apply, inasmuch as the purchaser has, in such a case, by the terms of his bargain, notice of a defect and an allowance for it, and it is his own fault if he does not sufficiently protect himself against the risks incidental to such a purchase. And indeed in all cases of the sale of goods, when the purchaser is satisfied without requiring a warranty, in the absence of fraud, he must bear the risk. See the case of Ormrod v. Huth, in the Exchequer Chamber, reported in 14 M. & W. 651.

As to the course pursued by the defendants in requiring the plaintiffs to take back the 25 cases, it does not appear to me that they were justified in so doing. No doubt there are cases in which a purchaser may return the goods. As for instance where an article is ordered from a manufacturer who contracts that it shall be of a certain quality or fit for a certain purpose, and there is no complete acceptance of the article. Or, when the article delivered is not the article sold. And it also seems that where goods are sold by sample, and on delivery but before acceptance they are found not to correspond with the sample, the purchaser might, in that case, if the right of property have not passed to him, be justified in returning the goods. See Dawson v. Collis, 10 C. B. 531 and Hart v. Mills, 15 M. & W. 85.

But, in the present case, there are none of the elements I have mentioned. The defendant was purchasing a well-ascertained article which, he might, if he had thought fit, have examined, the right of property passed by the bargain, and there was a delivery of the goods and an acceptance by the purchaser. Even, then, supposing this to have been a sale by sample, the purchaser would not have had the right to return the goods.

On the whole case, I am of opinion, that this was not a sale by sample, that there was no warranty, and therefore that the defendants took upon themselves the risk of the goods turning out well or ill. There must be judgment for the plaintiffs.

16th Februry 1870.

IN EQUITY.
BEFORE HIS HONOR SIRP. B. MAXWELL, Knt., Chief Justice. S. S.
SHATOMAH vs. KADER MEYDIN, Administrator of
Mustan Beebee and Hussain Saiboo, deceased.

A married woman whose husband was absent executed a Peed of Conveyance to the plaintiff "in consideration of love and natural affection," without obtaining his assent; nor were the requisite formalities required by Act 31 of 1854 as to married women complied with. She having died, the husband took administration to her estate and ejected the plaintiff from the land. The plaintiff filed a bill in Equity against the husband praying that he may be declared a trustee of the land for the use of the plaintiff, and that the plaintiff was entitled to the land. The Bill, having been demurred to for want of equity, was dismissed on the ground that the plaintiff was a mere volunteer, and equity would not assist a volunteer who wanted the aid of the Court to aid a defective execution.

Query.—Can such a deed be construed as a declaration of trust?

This was a suit in Equity instituted on 29th July last, in consequence of the defendant succeeding in an action of Ejectment against the present complainant. (a) The Petition in this suit prayed that the defendant might be declared a trustee of the land for the use of the complainant and that she was entitled to a conveyance of the land. It appeared that the land claimed had been duly assigned to the complainant by her sister, Mustan Bee, (the danghter-and administratrix of Hussain Saiboo), by Deed Poll dated 4th September 1860, in consideration of "love and affection borne by her to the complainant and for divers other good causes her thereunto moving." There was no covenant for further assurance, title, &c. At the time Mustan Bee executed the Deed Poll she was the wife of the defendant, but he did not assent to the conveyance nor were the requiste formalities required by Indian Act 31 of 1854 as to married women pursued. It is said the defendant was in foreign parts at the time of the conveyance and therefore did not join in the Deed. The defendant subsequently, on the death of the donor, took out Administration to her Estate and to her former husband Hussainsaw's Estate, and sued the complainant in Ejectment, wherein he obtained judgment. To the present action the defendant by his Counsel demurred for want of Equity.

The Court called on Mr Woods to support the Petition.

Mr Woods contended that the Deed Poll was a sufficient declaration, and that the Trust was perfect.

· 2 Spence Eq. Jurisp. 897 to 899, 902, 907, 910.

,, ,, ,, 52, 58, 284, 285.

Lewin on Trusts 81, 82.

Mr Logan (Sol. Gen.) appeared for the defendant, but was stopped by the Court.

<sup>(</sup>a) See page 260.

THE CHIEF JUSTICE.—The plaintiff appears to be a mere volunteer and desires the aid of the Court to aid a defective execution, I doubt if the Deed could be construed as a declaration of Trust even. The Bill must be disnissed.

Bill dismissed. (a)

(a) See 2 Spence 891, 192, 902, nete c. 909, 912, 913, 914, 57. Lewin on Trusts, ch. 5. § 2. p. 62, 84, 85, 86, 93. Smith's Man. of Eq. 27, 43

20th August 1870.

Before Sir P. B. Maxwell, Knt., Chief Justice, S. S. KOH BUAN v. TEOH CHOON.

A Promissory Note with a 3 cent adhesive stamp thereon is not properly stamped, and therefore not admissible in evidence.

So in an action on a Promissory Note under Act V of 1866 such note was rejected in evidence, the Court granted leave to add the common money counts and go to trial instanter.

There is no necessity for filing a declaration in an action under  $Act\ V$  of 1866, until appearance has been entered by the defendant.

This was an action commenced under Act V of 1866, on the defendant's inland Promissory Note, payable on demand, having a three cent adhesive stamp thereon, at the trial the note was tendered in evidence

Mr Woods for the Defendant objected to the note being admitted in evidence on the ground of its being improperly stamped and cited Ordinance 26 of 1867 Sects. 1, 2, 3, and 4, (a) and 1 Taunt 353.

Mr. Rodyk for the Plaintiff was heard contra.

THE COURT HELD, that the note was not properly stamped and therefore inadmissible in evidence.

Leave was then granted to add the common money counts, on the authority of the case cited and by consent the case proceeded to trial instanter, when judgment was given for the Plaintiff.

During the course of the trial it appeared that the declaration was filed before the Defendant had obtained leave to appear and defend.

THE COURT remarked, that there was no necessity for filing a declaration under Act 5 of 1866 until appearance had been entered by the Defendant. (b)

\_\_\_\_\_\_.

<sup>(</sup>a) The present Stamp Ordinance is 8 of 1873. (b) The same point was decided in 1866 by Sir W. Hackett in Singapore, and in Penang in 1868 in the case of Gun Ah Pang vs. Ho Ghee Sew. See also Green vs. Davis 3 LJ. KB. 185.—s. c. 4 B & C. 235., Chamberlain vs. Porter 1 B, & P. (N. S.) 30.

## 4th September 1870.

BEFORE SIR WM. HACKETT, KNT., Judge of Penang. HALEEMAH. vs. M. M. M. NOORDIN.

Interest allowed on a Promissory Note payable on demand, from the date of such note; if the note contain a stipulation as follows "with interest at 12 per cent per annum until payment."

This was an action on a Promissory Note. The Defendant not having pleaded, judgment by default was signed against him; and Mr. D. Logan now on behalf of the Plaintiff, moved to assess the damages, and in so doing, asked the Court for interest from the date of the note.

THE JUDGE at first doubted he could give any from the date of the note, but on reading the note which contained these words "with interest at 12 per cent per annum until payment," he allowed the interest as asked for. (a)

(a) See Act 32 of 1839; and in cases of Tort and Policies of Assurance, Acts 9 of 1840 and 26 of 1841.

# 6th. day of September 1870.

Before Sir Wm. Hackett, Knt., Judge of Penang.

Veloo Pullay, Appellant vs. Kadier and Coopay, Respondents. The refusal of a Police Magistrate to adjourn a case on account of the absence of counsel, is no ground for an appeal, although the party, who asked for such adjournment, loses his case.

In this case the usual Notice of Appeal having been served on the Magistrate, on the ground that he had improperly refused to adjourn the case on account of the absence of counsel, he refused to give the appellant, or to send up to the Court, the requisite documents.

Mr. Bond on behalf of the appellant under Act 27 of 1867 (a) (commonly called the Magistrate's Appeal Act.) moved the Court for a rule nisi on the Magistrate, to show cause, why he should not give the appellant, and the Court, the requisite documents. A rule having been granted.

Mr. Presgrave, (the Magistrate) shewed cause, but chiefly relied on the insufficiency of the Affidavit on which the rule was granted.

Mr. Bond in support of the rule, contended that the Affidavit was sufficient, and that this was a good ground for an appeal.

THE JUDGE held, that it was no ground for an appeal, and discharged the rule with costs.

Rule discharged with costs.

<sup>(</sup>a) Now Ordinance 9 of 1874.

#### 30th. June 1871.

Before Sir Wm. Hackett, Knt., Judge of Penang.

In the goods of Shaik Emam, deceased.

Probate to copy of a lost Will granted; there being sufficient evidence, of the existence of the original Will after the death of the testator.

This was a petition by Shaik Euscof, for Probate to the copy of the Will of the abovenamed deceased, the Will having been lost.

Mr Woods appeared for him, and contended, that there was sufficient evidence before the Court to show that the Will was in existence after the death of the testator; and that Probate of the Copy should be granted to the Petitioner, as the surviving Executor.

Syed Ally, the Executor of Sheriffa Bee, the late widow of the abovenamed deceased, opposed, and in person asked the Court not to grant Probate.

THE COURT HELD, that there was sufficient evidence of the existence of the Will after the testator's death, and accordingly granted Probate.

# 27th. November 1871.

Before Sir Wm. Hackett, Knt., Judge of Penang.

The Opium Farmer vs. Koh Boo An.

The Court will not 'restrain a Magistrate from hearing a case simply on the ground of a strong bias of the Magistrate against the party applying; as by doing so, it would throw discredit on the Magistrate.

This was a motion by Mr. Bond on behalf of the defendant abovenamed to restrain Mr. Skinner, Magistrate of Province Wellesley, from hearing and determining a charge of snuggling brought by the plaintiff against the defendant in Mr. Skinner's Court. The grounds on which he were, were, a strong bias of the Magistrate against the defendant.

THE JUDGE.—I cannot grant any rule nisi, as by simply doing so, I would throw discredit on the Magistrate, when the affidavit really proves nothing; such being the case, I am bound to presume that the Magistrate will do his duty rightly.

Rule Refused (a)

<sup>(</sup>a) The case was subsequently tried by Mr. Skinner and dismissed. See the Queen vs. Raud, 1 L.R. Q.B. 230,

#### 11th December 1871.

Before Sir William Hackett, Knt., Judge of Penang.

The Opium Farmer vs. Khoo Boo An.

A conviction of two offences under one penalty is bad—on appeal it was quash-cd. The Court will not order it to be amended as the mistake was incurable.

This was a case stated by Mr. Skinner, the Magistrate of Province Wellesley, on appeal by the defendant to the Supreme Court.

D. Logan (Solicitor General) for the Farmer.

R. C. Woods Jr., \* (Bond with him) for Khoo Boo An.

CHARGE.—For that the said Khoo Boo An was interested and concerned in the importation and introduction into Krean of certain chandoo in quantity, to wit, three tins.

AMENDED CHARGE.—1st. For that the said Khoo Boo An, being other than the Opium Farmer of P. W. Island, on the 21st day of September 1871, unlawfully did import and introduce into Krean, in Province Wellesley a dependency of P. W. Island within the Colony of the Straits Settlements, three Jins of illicit chandoo, against the provisions of the Excise Ordinance of 1870.

2nd. For that the said Khoo Boo An, being other than the Opium Farmer of P. W. Island aforesaid, on the day and year aforesaid, unlawfully and knowingly did aid, abet and procure the importation into Krean aforesaid, certain Chandoo in quantity, to wit, three tins of chandoo which he the said Khoo Boo An, then well knew was not prepared by, nor purchased from the Opium Farmer, nor from a Licensed Opium Farm Shopkeeper of the Settlement of P. W. Island, of the then current year.

3rd. For that the said Khoo Boo An, being other than the Opium Farmer of P. W. Island aforesaid, on the day and year aforesaid, was interested and concerned in the importation and introduction into Krean aforesaid of certain Chandoo in quantity, to wit, three tins of Chandoo, which he the said Khoo Boo An then well knew was not prepared by, nor purchased from the Opium Farmer, nor from a Licensed Opium Farm Shopkeeper of the Settlement of P. W. Island aforesaid, of the then current year.

#### CONVICTION.

 lony of the Straits Settlements three tins of illicit chandoo, against the provisions of the Excise Ordinance of 1870.

2nd. For that the said Khoo Boo An, being other than the Opinm Farmer of P. W. Island aforesaid, was interested and concerned in the importation and introduction into Krean aforesaid, of certain chandoo in quantity, to wit, three tins of chandoo, which he the said Khoo Boo An then well knew was not prepared by, nor purchased from the Opium Farmer, nor from a Licensed Opium Shopkeeper of P. W. Island of the then current year, against the provisions of the Excise Ordinance of 1870. And I the said Magistrate of Police adjudged the said Khoo Boo An for his offence, to pay a fine of Dollars seven hundred.

#### OBJECTIONS.

- 1. That § 101 of Act 13 of 1856 renders it imperative on the Magistrate to dismiss the charge on the non-appearance of the Prosecutor.
  - 2. No power to amend charge without re-issue of process.
  - 3. Conviction bad: one penalty though two offcuces stated.

On the 20th instant His Honor delivered Judgment. As to the 1st point, he decided, a Magistrate has an option to dismiss a case or adjourn it. The word "may" in the Act cannot be construed "shall": it must have its natural signification, and the first part of the section bears out that view. He cited Maxwell on Magistrates page 22 in favor of that view. With respect to the 2nd point, he ruled, the amendment could be made. He cited the dictum of Erle C. J. and Montague Smith J, in the Queen v. Shaw, 34 L J. M. C. 169. In this case he said that Boo An by going into his defence had, as he considered, waived the objection. With regard to the 3rd objection as to the conviction it was fatal. He decided, he could not amend it; that he could not strike out one count, or divide the penalty.

The Solicitor General applied to have the case sent back to the Magistrate but his Honor the Judge refused, saying the mistake is incurable.



#### 20th December 1871.

BEFORE SIR WM. HACKETT., Judge of Penang.

Lorrain Gillespie & Co. vs. Khow Heng Team & another-

A. bought and sold note, thus, "20 or 30 piculs white peper within 80 days or longer at option of purchasers," signed by Plaintiffs and Defendants respectively, is a good note so as to satisfy the 4th Section of the Statute of Frauds (29. Car. 2. c. 3.)

This was an action to recover \$ 108.09 as damages for breach of Contract, in not delivering a certain quantity of pepper. The De-

fendant pleaded "non assumpsit" and the plaintiffs joined issue in

the plea.

Mr. Rodyk on behalf of the defendants, contended, that the note was not sufficient to satisfy the 4th Section of the Statute of Frands, (29, Car. 2. c. 3.) as being uncertain when the goods were to be delivered; and that the words "or longer at option of purchasers," would enable the Plaintiffs to compel defendants to deliver the pepper even some years after; and the Defendants could not compel the Plaintiffs to accept the goods if they did not wish to do so.

Mr. Bond on behalf of the Plaintiffs, contended, that the words "within 30 days or longer at option of purchasers," merely meant that the pepper was to be delivered within 30 days or within a reasonable time. That this reasonable time was to be decided by law, and according to law, the Plaintiffs had requested the Defendants to

complete their contract within a reasonable time.

THE JUDGE HELD, that the words "or longer at option of purchasers" meant within a reasonable time, and that the Plaintiffs had applied to the Defendants to complete their contract within such time, and that the note was sufficient to satisfy the Statute of Frauds.

Judgment for Plaintiffs with costs.

# 1870.

Before Sir P. B. Maxwell, Knt., Chief Justice, S. S. In the goods of CAUDER MOHUDDEEN, deceased.

The Indian Act 20 of 1837 has changed the devolution of real property in the Straits from the heir to the Executor or Administrator for the purposes of Administration, only in cases where the deceased had both the beneficial estate as well as the legal rested in him, so that the heir of a deceased Trustee and not his Executor or Administrator is entitled to hold the trust property as the Trustee.

So where a man died leaving property for charitable purposes and appoints his son as Trustee of the property, and afterwards the son (the trustee) died; the Court refused to grant Administration, to either of the Estate of the deceased persons, to a grandson of the first named deceased so as the manage the charity, but held that the heir of the deceased son (the trustee) was the Trustee of the charity.

This was an application made to the Court for third Probate of the Will of Cauder Mohaddeen deceased. He died in 1834, having by his Will appointed his eldest son Othmanina, his Executor, with succession on death to his other son Othmansaw, on his decease, to the eldest of his grandsons, the issue of one of the sons. By the Will a certain portion of his landed E-tates had to be dedicated for charitable purposes according to Mahomedan law; and the Will

empowered that the rents and profits of these charitable lands should be admini-tered according to the directions of the Executor for the time being. 'The first son had sued out Probate and dedicated certain lands for charitable purposes under the Will-he died; the second son had sued out a second Probate-he died; and the eldest grandson (the issue of one of the son-) applied for the present and third Probate. To a question put by the Judge it was admitted that with the exception of the charity lands no other property of the testator was left unadministered. The applicant wanted a third Probate as evidence,—that he was clothed with the Executorship and entitled to direct the administration of the charitable lands. Judge said that Act 20 of 1837 had changed the devolution of real property in the Straits from the heir to the Executor or Administrator for the purposes of administration, only is cases when the deceased proprietor had the beneficial estate as well as the legal vested When he has the legal estate as trustee which was the case of the first Executor, in this case the legal estate would on his death descend to his heir, who would hold it as trustee under the Will. The moment the first Executor dedicated the lands to charitable purposes the property became no longer the testator's but became vested in the first Executor as trustee. If the Will gave the second son and on his death the eldest grandson, the right to direct the administration of the charitable lands they had no right to the legal estate nor would the legal estate be vested in either by their obtaining Probatethey would be entitled to have their right to make such directions enforced by suit in equity without Probate and the Court could not grant Probate unless there was property of the testator's left unadministered.

# 26th July 1871.

BEFORE SIR WM HACKETT., Judge of Penang.
LIM CHYE PEOW v. WEE BOON TEK.

Suit on the Civil side by Chinese wife for Restilution of conjugal rights. Plea to the jurisdiction. Held, that the Supreme Court has no jurisdiction.

Mr. C. W. Rodyk for Plaintiff.

Mr. I. S. Bond for Defendant.

This was a suit on the Civil side of the Court for restitution of conjugal rights. The defendant pleaded to the jurisdiction.

Mr. Bond—That the Court has no jurisdiction has been settled by a long series of cases, two of which have been decided in this Court! The first was in 1869, Veeramah and Sawmy (Woods Oriental cases, 38,) where the Petition of a Hindoo wife on the Ecclesiastical side was dismissed, and the other in 1869, Vadamalia Pillay and Shetthay Amah, (Woods, 41) in which it was decided

that the Court had no jurisdiction even on its CIVIL side in the case of Hindoos. This case was followed by Sulymon v. Galibbee in the Recorder's Court at Maulmain. As to English cases Ardaseer Cursetjee v. Perozeboye, (10 Moo. P. C. 375), decided that the Court has no jurisdiction on its Ecclesiastical side in the case of Parsees. This case was followed by the Morman Marriage case Hyde v. Hyde and Woodmansee. (35 L. J. P. & M. 57.); as to the Charter of Court, it must be construed in accordance with the decision of the Privy Council in the Bombay case, where the words of the Charter are similar.

Mr. Rodyk—The cases cited are with one exception on the Ecclesiastical side of the Courts, but this is on the Civil side, and there are several CHINESE cases decided in this Court in favor of the jurisdiction, Toh Lye v. Kaing Neoh in 1866, Regina v. Loon in 1864, (Woods, 39); with respect to Mahomedans there are the cases of Mahomed Hashim v. Halijah. in 1865, and Hassan Hussain v. Bahtijah Bee in 1866. The case of Vadamalia Pillay v. Shethay Amah (a) is doubtful, if the judgment of the Privy Council in 10 Moore is taken into consideration.

He said also Chotun Beebee v. Ameer Chund, 6 W. R. Civil. 105.

[The Judge—The suggestion or dictum of the Privy Council cannot give this Court any jurisdiction if it has none ] Then, Ordinance 5 of 1868 § 23 declares that this Court shall have and exercise the jurisdiction vested under the Letters Patent of the 10th August 1855 in the Court of Judicature of Prince of Wales' Island, Singapore and Malacca in Matrimonial cases, so far as the several religions, manners and customs of the inhabitants of the Colony will admit." In our Chief Justice's work on Magistrates at pages 143 and 144 it is stated thus:—"It sems indeed, that this principle of comity must ex necessitate be carried further by English Courts administering law in the East, than it would be carried, as regards foreign law, by our Courts at home. Thus, it has been declared incumbent on our Courts here to adapt their civil jurisdiction so as to administer to the non-Christian part of the population those remedies which they administer to the Christian population in matrimonial suits, in the exercise of their Ecclesiastical powers, since the latter powers do not extend to non-Christians; per cur. in Ardaseer Perozeboye, 10 Moo. P. C. 375, 418,"

[The Judge. The suggestion of the Privy Council can give no jurisdiction. The strongest authority is the Supreme Court Ordinance.] Mr. Bond in reply.—In the cases above cited no Plea to the jurisdiction was filed or the objection raised. Reg v. Loon is a case of Habeas Corpus and is no precedent for a suit like this. No MATRIMONIAL jurisdiction was granted by the Charter, and the words of the Ordinance must be construed as in the Bombay case.

[ The Judge — Would not Matrimonial be incidental to Ecclesiastical jurisdiction? The words of the Ordinance would otherwise be a dead letter.]

Cur. adv. vult.

On the 20th. January 1872, the following Judgment was delivered By His Honor the Judge.

This is a suit for restitution of conjugal rights, brought not on the Ecclesiastical, but, on the Civil side of this Court.

The petition states that the Plaintiff and the Defendant are both Chinese. That on the 25th of July 1871 the Plaintiff was lawfully married to the Defendant according to the rites and ceremonies prescribed by the Chinese law and faith and that the marriage was duly consummated. That on the 15th August the defendant left the Plaintiff and went to live apart from her and

PENANG. 284

that he refuses although frequently requested to return to her. That by the Chinese law the Plaintiff is entitled to have conjugal rights rendered to her by the Defendant. The petition goes on to pray that the Defendant may be compelled to return to the Plaintiff and to render her conjugal rights.

The defendant has pleaded in bar denying the jurisdiction of the Court and it therefore becomes necessary to inquire what the jurisdiction of the Court in

Matrimonial suits is,

The jurisdiction of this Court is defined by the Supreme Court Ordinance of 1868, which repealed the Letters Patent reconstituting the old Court of Judicature. In the 23rd Section of that Ordinance we find the following provision. "The Court shall have and exercise the jurisdiction vested under the Letters Patent of August 1855, in the Court of Judicature of Prince of Wales' Island, Singapore and Malacca, in Matrimomal cases so far as the several religions, mainers and customs of the Inhabitants of this Colony will admit."

The jurisdiction of the Court, therefore, in Matrimonial causes. is precisely the same as that vested in the Court of Judicature by the Letters Patent of 1855. Now the only provision in that Charter which can be construed to confer Matrimonial jurisdiction, is that which ordains that the Court "shall have and exercise jurisdiction as an Ecclesiastical Court so far as the several religions, manners and customs of the inhabitants of the Settlement and places will admit." There is not a word in the Charter about the Matrimonial causes conomine and the jurisdiction in those cases was merely one of those classes of cases which the Ecclesiastical Court has always dealt with.

The jurisdiction in Matrimonial causes therefore given by the Supreme Court Ordinance is simply the jurisdiction which was exercised by the Court of Judicature as an Ecclesiastical Court, and the contention of the Defendant is that this suit having been brought on the Civil side, the Court has no jurisdiction in-as-much as all suits of a Matrimonial nature should properly be brought on the Ecclesiastical side of the Court.

The principle involved in the question thus raised is of some importance in-asmuch as if suitors are declared incompetent to bring suits of a similar description on the Civil side of the Court, a very large proportion of the Inhabitants of these Settlements will be deprived of those remedies which the law gives to husbands and wives professing the Christian religion, who sue for redress in the proper Matrimonial Court. The case of Ardaseer Cursetjee v Perozeboye (10 Moo. P. C. Ca. 375) decided that the Supreme Court of Bombay on its Ecclesiastical side (and it must be remarked that the Words of the Bombay Charter of Justice conferring Ecclesiastical jurisdiction are very similar to those of the Penang Charter) had no jurisdiction on its Ecclesiastical side to entertain a suit, by a Parsee wife against a Parsee husband for restitution of conjugal rights as there existed such a difference between the duties and obligations of a matrimonial union among Parsees from that of Christians, that the Court if it made a decree had no means of enforcing it except according to the principles governing the matrimonial law in Doctors Commons which were in such a case incompatible with the laws and customs of Parsecs. The effect of this decision was to exclude all persons except Christians from their right to bring Matrimonial suits in the Ecclesiastical Court, and as the only Matrimonial jurisdiction expressly given to the Supreme Court is as I have shown that exercised as an Ecclesiastical Court it becomes necessary to consider whether under the general powers conferred upon it, the Court on its Civil side has power to entertain such a suit. The general powers of the Court are defined in the 23rd section of the Supreme Court Ordinance as follows: "The Court shall have such jurisdiction and authority as the Court of Queen's Bench and the Justices thereof, and also as the Court of Chancery and the Courts of Common Pleas and Exchequer respectively and the several Judges, Justices and Barons thereof respectively have and may lawfully exercise in England in all Civil and Criminal actions."

The Court then possesses the powers of the Superior Courts in England and cannot exercise any jurisdiction which would not be properly exerciseable by those Courts. In deciding whether this suit is properly brought, it is necessary therefore, to refer to the law of England and to those institutions in which our Supreme Court has been modelled, in order to ascertain what are the proper limits of the jurisdiction of the Civil and Ecclesiastical tribunals respectively, and how far this Court is bound by those limits as established by precedent and authority.

' Now it cannot be denied that the present suit is novel; I cannot say that is prime impressionis as there are some petitions similar to the present on the files of the Court, but this is the first case in which as far as I am aware the question of the jurisdiction of the Court has been formally raised. In England it is perhaps needless to say that no such suit as the present has ever been brought. It is well known that from the earliest times in the history of our law, the Ecclesiastical Court assumed exclusive cognizance of certain matrimonial questions and especially of those in which either a divorce or a rendering of conjugal rights was sought. The jurisdiction of the Spiritual Judges to decide upon the delicate questions arising from the relations between husband and wife was never disputed by the Temporal Judges, -and remained untouched by the Parliament. It is alleged as a reason for this, that as marriage was admitted by the religion of the country to be a Sacrament, the jurisdiction of the Ecclesiastical tribunals, could not well be disputed. But I think a sufficient reason may be found in the consideration that in these matrimonial matters which were considered to fall peculiarly within the cognizance of the Spiritual Court the ordinary tribunals of the country would have been incompetent to afford a complete remedy. The Common Law Judge indeed might have forcibly compelled the delinquent husband or wife to return to the conjugal abode, but how could be possibly have pretended to enforce the rendering of the conjugalia obsequia which were sought for by the complainant. The Common Law therefore feeling itself powerless to deal with these matters, wisely withdrew, and decided to leave them to be dealt with by the Judges whose peculiar province it was to settle matrimonial disputes. The same anthority which had united the spouses together was found to be the most fitting tribunal to appeal to in matrimonial disputes. The Ecclesiastical Court could act upon the guilty or rebellious spouse by monition and in case of need by excommunication. It could appeal to the conscience which in the delicate relation of husband and wife is the only forum where complete reparation can be made. The Common Law Courts might indeed force the reluctant spouse back to his home but once there it must leave him. But the object of the Spiritual Court was to restore peace to the household and to engage spouses to render to each other that mutual love and affection which they had vowed at the altar.

Gradually, no doubt the proceedings of the Ecclesiastical Courts ceased to be characterized by that paternal solicitude for the welfare of those who sought its aid which at first rendered them the fittest tribunals for the settlement of matrimonial disputes. In process of time they became in effect mere lay tribunals presided over by laymen, and the spiritual punishments, which ori-

ginally they were able to invoke in aid of their decrees, caused to have any terrors for their objects. The term restitution of conjugal rights came to mean nothing more than a return to cohabitation in a dwelling in the same house. But notwithstanding this alteration of their character, the Ecclesiastical Courts continued to preserve the exclusive cognizance of all suits of a matrimonial nature which they had held from the earliest times, and the ordinary tribunals made no attempt to interfere with them in the exercise of this jurisdiction.

How far at Common Law the husband had a right to the custody of his wife seems to have been doubted in some of the earlier cases See Rex. v. Maru Mead 1 Bun, 542., Rex. v. Lister 1 Str. 478. But in ex-parte Sandilands, 21 L. J. Q. B 342., the Court of Q. B. refused an application on the part of the bushand for a writ of habeas corpus to bring up the body of his wife, it anpearing upon the affidavit that she was staying with her son against whom the application was made, by her own consent, and that no coercion or imprisonment had been used towards her. Lord Campbell C.J. on that occasion said: - If this writ were to go, and the lady were to be produced in Court, she would be at liberty to follow her inclination, and to return to her son's protection, and we could not make an order upon her to return to her husband. The constitution of this country has wisely pointed out a tribunal where such a subject may be dealt with; and if the applicant shows that his wife has no good cause for living apart from him, there will be a decree in the Ecclesiastical Court that she shall return to him, and reside in his house, bed and board being restored. But here it is clear on the Affidavits that the lady is under no restraint. The case of infants is totally different, for there the father has a right to the custody of his child; and if he is deprived of that right, and the child be of tender years, the Court will order the child to be restored to his father; but the Court has no power to restore a wife to her husband, and a writ of habens corpus in this case, if granted, would be wholly nugatory. It is ethough, however, to say that the Court has no power to grant the writ. "

Assuming therefore, as I must assume, that this Court has merely the ordinary jurisdiction of the Superior Courts in England, it follows from what I have said that as a general rule, a suit for restitution of conjugal rights does not lie on the Civil side of the Court. The petitioner however in the present case rests her claim on the circumstance that being a Chinese she cannot sue in the Ecclesiastical Court and that her only remedy is on the Civil side of the Court. And it is urged that although suits of this nature have always in England been left to the determination of the Ecclesiastical tribunals, still the powers of the ordinary Courts of the country are sufficiently comprehensive and elastic to authorize them to interfere whenever a fitting occasion arises to call for their intervention.

Now it appears to me that this argument is founded on purely speculative considerations and that it involves a pure assumption. It is difficult now to say positively, why the Common Law Courts refused to interpose their authority to compel the co-habitation of husband and wife and in many other questions of a matrimonial nature, but it seems to me just as reasonable to suppose that the abstention arose from the feeling that these matters were beyond the proper scope of their powers and that they could only be properly dealt with by tribunals which could act upon the consciences of suitors, as that it was solely owing to the circumstance of marriage being deemed a Sacrament, I do not therefore feel myself justified, from any speculation as to what might possibly have been the policy of the law in fixing the boundaries of the jurisdiction of

the various tribunals of the country, or from any opinion I may entertain as to the expansiveness and elasticity of the common law in extending it beyond those limits which precedent and authority have assigned to it.

As Baron Parke observed in Egert in v. Brownlow. (4 H. L. C. 123) is the province of the Statesmen and not the lawyer to discuss and of the Legislature to determine what is best for the public good and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the Statutes; the unwritten or common law from the decision of our predecessors and of our existing Courts upon the principles clearly to be deduced from them by sound reason and just inference and not to speculate what in his opinion is best for the community."

It is easy to illustrate the difficulties which might arise from admitting the principle that a judge is authorized, when an injury has been done, for which the law gives no remedy, to enlarge his jurisdiction, to meet the exigencies of the case, I will suppose the case of there being no Court here possessing Admiralty Jurisdiction—a supposition which might at any time be realized. Would it be competent to the Judge on the ground that there was no other tribunal empowered to deal with Admiralty cases to assume to himself on the plea of necessity, Admiralty jurisdiction. This I think could searcely be contended for. It is clear that every Court is bound to exercise its jurisdiction within the limits imposed upon it by law, and that those limits cannot be exceeded except by the authority of the Legislature.

I am aware that Sir B. Maxwell considered himself bound by the suggestion which was made by Dr. Lushington in the case of Cursetjee v. Perozeboy, when that karned Judge said. "We should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them (the Parsees);" and he goes on, "such remedies we conclude that the Supreme Court on the Civil might administer or at least remedies as nearly approaching to them as circumstances would admit."

But it must be remembered that in using this language Dr. Lushington is speaking of the Courts of India. Now the Courts of India have special powers conferred upon them with reference to native laws which this Court does not possess. As Doctor Lushington observes "The Civil Courts of India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindoos." No such powers have been conferred upon this Court and the omission from the Penang Charter of the clauses of the Indian Charters authorizing the judges to decide in certain matters according to Hindoo or Mahomedan law is remarkable and significant. The maxim expressio unius, exclusio alterius seems to me to apply, especially when we consider that both the Indian Charters and our own emanated from the same department of the State. I am therefore of opinion that Dr. Lushington's suggestion however just it may be as applied to the Courts of India is quite inapplicable to a Court constituted like our Supreme Court.

But it may be said the parties are in the position of foreigners and the aid of the Court is sought in a matter arising out of the contract of marriage which is juris gentium and they are entitled to relief on the ground of comity. It is true as Lord Stowell observed of marriage there that is a jus gentium upon this matter, a comity which treats with tenderness, or at least with toleration, the opinion and usages of a distinct people in this transaction. In this Court

the marriages of Chinese, Hindoos and Mahomedans have always been recognized if contracted in accordance with their respective laws. In questions as to the legitimacy of offspring and for other purposes these unions ought no doubt to be upheld. But a totally different question seems to me to be raised when the petitioner asks the Court, to exercise its jurisdiction to meet the case of an injury which she alleges she has sustained.

The observation of Justice Story upon a similar question seems to me deserv-

ing of citation.

"It is universally admitted and established," says this learned Judge that the forms of remedies and the modes of proceeding and the execution of Judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted; or as the civilians uniformly express it, according to the lex fori. The reasons for this doctrine are so obvious, that they scarcely require any illustration, each nation is at liberty to adopt such forms and such a course of proceeding as best compats with its convenience and interests, and the interests of its own subjects, for whom its laws are particularly designed, all that any nation can, therefore, be justly required to do, is to open its own tribunals to foreigners, in the same manner and to the same extent, as they are open to its own subjects and to give them the same redress as to rights and wrongs which it deems fit to acknowledge in its own Municipal Code for natives and resident. (Story Confl. of Laws, ss. 556, 557.)

On the whole I am of opinion that the suit for restitution of conjugal rights is by the law of the Colony and by the constitution of the Supreme Court, a remedy peculiar to the Ecclesiastical side of the Court and that the Judge on the

Civil side has no jurisdiction in such a suit.

# 16th March 1872.

BEFORE SIR WM. HACKETT, Knt., Judge of Penang, FATIMAH AND OTHERS US: DANIEL LOGAN AND OTHERS.

Penang having been taken possession of in the name of the King of England

for the use of the East India Company, the law of England was immediately imported into it, and all laws previously in existence was thereby abolished. The mere fact that at that time there were few wandering fishermen on the Island does not take it out of this general rule of law, as they could not be regarded in the same light as the inhabitants of a settled country with laws of their own, and who are entitled to the benefit of them until changed by competent authority. Nor does the circumstance of possession of the island being taken by an officer of the E. I. Company prevent the transfer of the sovereignty and dominion of the island to the Crown of Great Britain and Ireland, especially as by the Act 53 Geo. 3. C. 155. s. 95. the undoubted sovereignty of the Crown of England over all the ter-

A Clause prohibiting the devisees and legatees from "proceeding to law in any Court or Courts for their said shares" under the pain of losing their legacies, is void as being repugnant and inconsistent with the gifts, as property is inseparable from the right to institute legal proceedings, and the protection of the law.

ritorial acquisitions of the Company, was preserved. At all events, if the English law was not then imported it was imported by the Charter of 1807.

Though by the Mahomedan law concubines may be incompetent witnesses to prove a divorce, still that is no reason why their evidence should not be received in a Court of Justice, as the competency of witnesses is to be determined by the

law of the place where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it.

If a testator gives certain personal property. (naming them) to legatees, and in a subsequent part of his Will he gives the whole of his personal property to his Executors upon certain trusts, such latter part will not prevail over the former as being irreconcilable with it on the principle that it deno tes a subsequent intention, as this rule only applies on the failure of every attempt to give to the whole such a construction as will render every part of it effective; and the general terms of the latter shall not be held to control the distinct terms of the former.

A testator having devised 11 pieces of land in P. particularly described in his Will to Trustees, directed that the lands should be called the " Whakkoff of M. N., "and he further directed his Trustees out of the rents and profits of the said lands to pay for ever the sum of \$20 monthly to the managing body of a School in Chulia Street, Penang, also the sum of \$60 monthly to the petitioner T. C. M. and her lawful issue during their natural lives, the sum of \$40-monthly for the maintenance of one of his sons and his wife. The testator then gave the residue of the said devised premises upon trusts as follows: - 'to expend for the yearly performance of Kandoories and entertainments for me and in my name to commence on the anniversary of my dece ase according to the Mahomedan religion or custom, such Kandoories and entertainments to continue for ten successive days every year, and also in the perform tree of an annual Kandoorie in the name of all the prophets, and to expend the same in giving a Kandoorie or feast according to the Mahomedan religion or custom to the poor for ten successive days in every year from the anniversary of my decease, to the extent of three hundred dollars, including the costs of lighting up the Mosque or burial place of my deccased mother and the schoolrooms thereto adjoining-And also to give Kandoories or feasts to the poor as aforesaid, once in every three months to the extent of one hundred dollars, and provided there should remain any surplus monies then the same is to be expended in purchasing clothes for distribution to the poor."-HELD (firstly) that the trust for the school was a good charitable gift, and therefore valid.—HELD (secondly) that the gift to T. C. M. and her issue was a gift to her for life, for her sole and separate use, with remainder to such of her children as were in existence at the time of the testator's death as joint tenants for life. That the word "issues" was used in the sense of "children," and was a word of purchase and not of limitation, and as the gift was only for life, the children born after testator's death could not be let in .- Held (thirdly) that the gift of the residue of the rents and profits for Kandoories &c. was not a charitable gift but void as tending to a perpetuity.—Held (fourthly) that the gift for clothes to the poor was a good charitable gift, and as the amount of the surplus monies with which it was to be paid, was sufficiently certain, the gift of the surplus was valid.

By a clause, the testator directed the rents and profits of his estates, after deducting the expenses of collection and management, to be divided into twenty four shares, which shares were to be held upon trust for the benefit of his children thereafter named and their issues. The testator then proceeded to distribute these twenty four shares amongst his children and grandchildren in certain proportions, and finally directed as follows; "I direct that the annual income of the said share or shares so set apart for my said sons and grandsons and their respective issues in the said trust estate and premises shall be paid to the same son or grandson during his life, and from and after his decease that his said share or shares shall be held in trust for all such ones born in his lifetime at such ages and ti mes as he may by any writing under his hand or by his Will appoint, and in de-

finalt of such appointment &c. in trust for all his children who benig a son shall attain the age of twenty one years or being a daughter shall attain that age or marry in equal shares and if then there shall be but one such child, the whole to be intrust for such child"—Help that it was not void on the ground of remoteness.

A testator by his Will gave a legacy to M. N. and his issue, and directed that in case he died without issue his share was to go to A. C. J. and R. B. and their issues in equal shares. He'also gave a legacy to A. C. J. and directed that in case he died without issue his share was to go to M. N. and R. B.; A. C. J. having died in the lifetime of the testator without issue.—Help that the words "die leaving no issue" apply to death in the testator's life time and that the gift to A. C. J. did not lapse, but the ulterior gift took effect as a simple absolute gift.

A testutor by a portion of his Will devises his lands situate at A. and T. for certain purposes, and in a subsequent part of his Will he devised the rest and residue of his estates at P. and, P. W. or elsewhere (exclusive of those which he had by deed of gift given to his children and grandchildren). "for certain other purposes." Held that these two clauses where not inconsistent, as the words "rest and residue" excluded what the test for had already given, and the effects of these words were not effected by the parenthetical clause.

THE JUDGE.—In this case a petition has been filed on the Equity side of the Court by Fatimah styling herself the widow of the late Mahomed Noordin and Tengah Chee Mah, his daughter, and the husband of the latter against the Executors and the persons interested under the Will of the late Mahomed Noordin, a Mahomedan merchant of Penang, who died here on the 12th April, 1870.

The object of the Petition is to obtain a decree of the Court declaring that the deceased died intestate as to all such portion of his movable or immovable property as may be found to be disposed of or attempted to be disposed of in a way contrary to the law of England, or contrary to the Mahamedan law, if the Court finds that the latter law is in force in the Settlement of Penang in the case of Mahomedans, and that the estate and effects of the deceased may be distributed under the decree of the Court so far as the Will may be found to be inconsistent with the English or the Mahomedan law, according to the rules of the English or Mahomedan law. tition further prays that such of the defendants as have received deeds purporting to have been executed by the late Mahomed Noordin and purporting to operate as conveyances of lands or interest in lands the property of the deceased during his lifetime and which deeds were not delivered during his lifetime with the intention that the same should operate as conveyances of any interests or estates shall be decreed to bring in the same to be cancelled. The petition also asks for an injunction. At the hearing of the cause there were three preliminary questions argued. First, whether the capacity of the deceased to make a Will was to be decided by the Mahomedan or by the English law. Secondly, whether the 11th clause of the Will

which directed that if any of the testator's sons or daughters &c.. disagreed respecting their shares and proceeded to law in any Court for their shares such &c. should only be entitled to five hundred rupees and should forfeit all their shares under the Will and that the share of any one so disputing should be divided amongst the rest, The third question affects only the Plaintiff Fatimah and arises upon a plea which alleges her to have been divorced from the deceased sometime before his death. The first question is raised in the 15th, 16th, 17th and 18th paragraphs of the Petition, which are as follows:-15th. That your Petitioners are further advised and charge that there is no valid residuary disposition of the estate and effects of the said Mahomed Noordin in the said or any other valid Will, and that in consequence the greater portion of the said estate will fall to be distributed according to the Statute for the distribution of intestate's estates or by Mahomedan law in which case your Petitioners are interested as next of Kin of the said deceased. 16th, Your Petitioners further state, that the deceased was born in the Settlement of Penang in the year 1802 before the publicaion of the first Charter of Justice under Royal Letters Patent of 1807, for the said Settlement. that the Settlement was then under the Government of the Presidency of Fort William in Bengal, and subject to the same laws as that Presidency. 17th, That in the Presidency of Fort William in Bengal Mahomedan law is and was administered to inhabitants profes. sing the Mahomedan religion, and that law existed in Penang before the publication of the first Charter of Justice and was not altered in this respect by the first or any subsequent Charter passed under Royal Letters Patent for the administration of Justice in the said Settlements wherefore your Petitioners are advised and charge that the matter in question of the estate of Mahomed Noordin ought to be administered and the estate dealt with according to Mahomedan 18th, That your Petitioners are advised and charge that the said Will is not in accordance with Mahomedan law, and your Petitioners charge that by the law the estate and effects of the deceased ought to be distributed in certain fixed shares or proportions amongst the next of kin according to Mahomedan law subject to such bequests as may be found in the deceased's Will to be in accordance with Mahomedan law. The defendants in their answer admit, that Mahomed Noordin was born in Penang, but do not admit that he was born before the passing of the Charter of Justice of 1807 and there is no evidence whatever as to the exact date of his birth. But they altogether deny that the Settlement of Penang was then (that is previous to 1807) under the Government of the Presidency of Fort. William in Bengal or subject to the same laws as that Presidency

And they further say that even if the Settlement of Penang was previous to the said Charter of Justice subject to the same laws as the said Presidency, such fact does in no way affect the question as to the law by which the said Will ought to be construed or by which the said estate and effects should be administered. The defendants do deny that in the Presidency of Fort William in Bengal, Mahomedan law is and was administered to inhabitants professing the Mahomedan religion or that the Mahomedan law existed in Penang before the Publication of the First Charter of Justice or that it was not altered in this respect by the first or any subsequent Charter of Justice.

In his argument upon this part of the case the Attorney General\* for the Plaintiffs maintained two propositions—First, that previous to the Charter of 1807, Mahomedan law was in force in Penang; and secondly, that the Charter made no alteration in the law in this respect. In support of the first proposition, he argued, that Penang being a part of the territories of the Rajah of Quedah, a Mahomedan Prince, the Mahomedan law continued in force after the cession until it should be altered by competent authority, and he contended that there is no evidence of any attempt to alter the old law or to introduce a new one until the publication of the Charter of 1807.

It sppears to me that this position is untenable. In 1786, Penang being then a desert and uncultivated Island, uninhabited except by a few itenerant fishermen, and without any fixed institution, was ceded by the Rajah of Quedah to Captain Light, an Officer of the East India Company, for and on behalf of the Company. On the occasion of taking possession of the Island, Captain Light published the following proclamation.

#### PROCLAMATION.

These are to certify that agreeable to my orders and instructions from the Hon'ble the Governor General and Council of Bengal, I have this day taken possession of this Island called Pulo Penang now named the Prince of Wales' Island, and hoisted the British Colors in the mame of His Majesty George the Third, and for the use of the Honourable English East India Company, this eleventh day of August, One Thousand Seven Hundred and Eighty Six, being the eve of the Prince of Wales' birthday.

In the presence of the undersigned, Francis Light.

Immediately after the Island had been thus formally occupied its Settlement commenced, and the enterprise was so successful that in three years from the date of the original settlement we find Captain

<sup>\*</sup> Mr. T. Braddell.

Light stating that there was a population of 10,000 persons settled in the I-land and that this number was being continually increased.

Here we have the fact that an Island virtually uninhabited is occupied and settled by British subjects in the name of the King of The case therefore would seem to fall within the general rule laid down in our law books and which Lord Kingsdon thus expresses in a recent case. "When Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own state; and those who live amongst them and become members of their community become also partakers of and subject to the same laws" (2. Moo. P. C. N. S. 59.). But it seems to have been thought that Penang did nor come within the operation of the rule to which I have referred for two reasons:-first, because the Island was not altogether vacant of inhabitants; and secondly, because it was taken possession of on behalf of the East India Company and was therefore not directly subject to the English Crown. But it can scarcely be seriously contended that the few wandering fishermen who were found on the shores of the Island could be regarded in the same light as the inhabitants of a settled country with laws of their own, and who are entitled to the benefit of them until changed by competent authority. I think that the circumstances of possession of the Island being taken by an Officer of the East India Company for and on behalf of the Company, prevented the transfer of the sovereignty and dominion of the I-land to the Crown of Great Britain and Ircland. can be clearer than the determination of Parliament to preserve the undoubted sovereignty of the Crown of England over the territorial acquisitions of the Company. This is shewn by the declamatory "Provided always that noclause in Act 53 Geo. 3, c. 155 s. 95 thing herein contained shall be construed to extend to prejudice or affect the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the said territorial acquisitions." And indeed it is difficult to conceive how any English Company could without the clearest and most positive expression of the intention of the Legislature be made exempt from that allegiance which all British subjects owe to the laws of their country.

But it has also been argued by the Attorney General that Penang was a dependency of Fort William in Bengal and therefore subject to the same laws as that Presidency. And as by the laws in force in Bengal, Mahomedans were entitled in all matters of contract inheritance or succession to the benefit of their own law, Mahomedans in Penang must be held entitled to the same privilege.

In support of his proposition he has cited Act 13 Geo. 3. c. 63 s. 38, which empowers the Governor General and Council at Fort William to make rules and ordinances for Government of places subordinate thereto and 21, Geo. 3. c. 70 ss 17 and 18.

And with regard to the first mentioned Act it is sufficient to observe that no laws or regulations ever were made in pursuance thereof which affected the Settlement of Penang. Indeed it is not a little remarkable that for many years the Indian Government was of opinion that it had no power to legislate for the Island, and it is only about the year 1800, that we find the Advocate General of the Indian Government expressing his opinion that the Governor General was authorized to enact laws, Civil and Criminal, for the Government of Prince of Wales' Island in the same manner as he did for the Province of Bengal.

And as to Act 21. Geo. 3. c. 70. ss. 17 and 18 they in terms apply only to the jurisdiction of the Supreme Court at Fort William over the inhabitants of Calcutta, and therefore do not affect the question.

The Attorney General also called my attention to what he terms an ordinance of the Governor General in Council, which he said has been overlooked by all the Judges. It is found in a letter of instructions addressed by the Chief Secretary to the Indian Government to Sir G. Leith, Lieut-Governor of the Island, dated 15th March 1800.

In this letter under the heading of "Administration of Civil and Criminal Justice" the Governor General in Council says: 16th, "The laws of the different people and tribes of which the inhabitants consist tempered by such parts of the British law as are of universal application, being founded on the principles of natural justice, shall constitute the rules of decisions in the Courts." But independently of the objection that this regulation is contained in a mere letter of instructions, the paragraph which follows shows that it was not intended to operate as a binding law, but was simply a direction to frame regulations in accordance with the principle thus laid down. In par. 17. The Governor General goes on, "you will accordingly proceed to frame regulations for the administration of Justice to the native inhabitants founded on the above principles."

And it is quite certain that Mr. Dickens who was sent about the same time to act as Judge at Pinang never regarded the instructions contained in the letter as having the force of law.

Sir Benson Maxwell in the case of Reg. v. Willans, (a) seemed to think that Penang could not be considered a British Colony in the

<sup>(</sup>a) See page 66.

ordinary sense of the word, and expressed his opinion that Capt. Light and his companions were a mere garrison and that having regained the temporary nature and object of their inhabitancy the law of England can hardly have been made the lex loci by them, but with all respect for the opinion of that learned Judge, I think the facts do not support it. Capt. Light was not merely the commander of a garrison but was also an able Administrator under whose rule the infant settlement progressed so rapidly that as has already been seen in three years from its foundation it contained a population of 10,000 people.

But, as has been observed by Sir B. Maxwell in Reg. v. Willans whatever ought de Jure to have been the law of the land when the Colony was founded, it is quite clear that for the first twenty years of its existence no body of known law was in fact recognized as the This appears clearly from a report made by Mr. law of the place. Dickens. Writing in 1803 this gentleman says; "His Excellency in Council has been heretofore informed that Prince of Wales' Island prior to its cession in 1786, was under the dominion of a chief who governed arbitrarily and not by fixed laws. It has now become my painful duty to state that it has so continued to be governed without fixed laws, for upon the time of my arrival in the Island there were not any fixed laws, and there are not even now any Municipal, Criminal or Civil laws in force in this Island." Unless Penang did not fall within the general rule as to the settlement of uninhabited countries, it would seem more correct to say that there were not any legally constituted Courts to administer the law, than that there were no laws whatever in force.

The Charter of Justice of 1807 seems to have set at rest this vexed question of the lex loci of Penang. In India the Judges have in a long series of Judgments which have not been dissented from by the Privy Council, held that the first introduction of English law into Calcutta was effected by the Charter of George I, by which, in the year 1726 the Mayor's Court was established, and the Judges of this Settlement have felt themselves bound by the uniform course of anthority to hold that the introduction of the King's Charter had a similar effect here. The question has been re-opened by the Attorney General and he has maintained, in opposition to the views I have mentioned that the King's Charter of 1807 had no effect upon the law of the place, being a mere machine through whose instrumentality the law is enforced. He also relied on the circumstances that the Court is directed in Civil matters, to give judgment. not according to the law of England but according to justice and right. But as Sir Barnes Peacock observed in the case of the Advocate General of Bengal vs. Rance Samonoye Dorse, (9 Moo-Ind. App. 398) speaking of the Charter of Geo. I. ( and his remarks are equally applicable to the Penang Charter of 1807) "There can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place and of The words give judgment according the inhabitants should admit. to justice and right, in suits and pleas between party and party. could have no other reasonable meaning than justice and right according to the laws of England so far as they regulated private rights between party and party." But if the current of authority which has flowed so long in one direction is to be disturbed, it cannot be in this Court, I am therefore of opinion that qua cunque via, either on the settlement of the Island, or if not then by the Charter of 1807. the law of England was introduced into Pinang, and became the law of the land and that all who settled here became subject to that law. It is scarcely necessary to add that our Charters contain no provisions corresponding to those of the Indian Charter, which confers certain privileges on Mahomedan Gentoos, and therefore that there is no ground to hold them exempt from subjection to the law of the place. It follows from what I have said, that inasmuch as English law has prevailed in Penang certainly ever since the publication of the first Charter in 1807, and Mahomed Noordin was domiciled here at the time of making his Will and up to the time of his death that his capacity to make a Will must be decided not by Mahomedan law but by the lex loci, which here is the law of England as it has been modified by the Indian and Colonial Legislatures. And it appears to me that there is no hardship to Mahomedans in holding this. As Sir B. Malkin observed in Abdullah's case "it is the fault of native holders of property if any inconvenience results from such a decision. And that the law as then established gives the most unlimited freedom of disposal of property by Will, any man who wishes his property to devolve according to the Mahomedan, Chinese or other law, has only to make his Will to that effect, and the Court will be bound to ascertain that law and apply it for him." (a) question arose on the eleventh clause of the Will which is as follows: "I do hereby strictly direct that hereafter if any of my sons or daughters, grandsons or granddaughters herein mentioned or any of their issue disagree with each other, respecting their shares mentioned herein, disputing to sell my real property and proceeding to law in any Court or Courts, for their said shares, each or any one of them so doing or disputing, shall only be entitled to receive the sum of Company's Rupees 500 and forfeit all his her or their share, that I

<sup>(</sup>a) See page 22..... S. L.

have proportioned in this my Will and have no more claim to my estate, and I direct my Executors and Trustees to pay the above sum of Company's Rupees five hundred, to such disputing son or daughter, grandson or granddaughter or their issue as aforesaid, and the share or shares of such disputing son or daughter, grandson or granddaughter or their issue to be divided amongst the rest of them whose names are mentioned in this my Will "

It has been contended on behalf of the plaintiffs that the clause is void as being repugnant and inconsistent with the gifts.

Mr. B. Rodyk for the defendant, in opposition to this contention, relied upon the case of Cook v. Turner 14 Sim. 493, in which a clause of revocation and gift even if the devisees should dispute the Will or the testator's competency to make a Will were held valid. But it seems to me that the proviso in the present case more, resembles that, in the case of Rhoder vs. Muswell Hill Land Company (30 L. J. N. R. ch 509) where the Master of the Rolls decided that a proviso that if any dispute arose between his devisees it should be referred to arbitration, and that if any devisee took proceedings at law or in Equity, his estate should go over, was invalid, as being renugnant and inconsistent with the gifts. In that case the M. R. said: "The effect is the same as if the Testator had said, 'I give you this property, and I impose on you a condition, that if you resort to any legal proceedings necessary to secure the gift you shall lose Any such stipulation would be absurd, as property is inseparable from the right to institute legal proceedings, and the protection of the law. If it was once ascertained that a party was unable to take legal proceedings to substantiate his title, the very persons against whom he was to enjoy the property would take possession and keep it, and they would have the advantage of the conditions and ultimately the protections of the law, as after a certain time, it would recognize their right to the property." In the present case the devisees and legatees are prohibited from "proceeding to law in any Court or Courts for their said shares."

It seems to me that the very provise is open to the very same objection as that in Rhoder v. The Muswell Hill Land Coy., and that it is equally inconsistent and repugnant to the devisee. I am of opinion therefore that it is void. (a) The third question is that arising on the plea of Daniel Logan and others of the defendants. The plea in effect alleges, that the Petitioner Fatimah was duly divorced from her husband the late Mahomed Noordin according to the Mahomedan law and religion, and

<sup>(</sup>a) See, Sim. Man. of Eq. 247-48. Morris v. Burroughs 1. Atk. 404. and note (1): Wheeler v. Bingham, 1 Wils. 135.

that she was never re-married to him. There is no dispute as to the marriage and the only question is whether there was a regular divorce according to Mahomedan law. (b)

Several witnesses were examined on behalf of the defendants to prove the divorce. Vappoo Noordin, the eldest son, said that he had heard of the divorce and had seen the paper of divorce but was not present on the occasion. The witness also proved his father's signature in two books produced in Court, purporting to be records or registers of the divorce (Exhibits A & B). Nina Noordin, the second son, stated that his fatherwas divorced from Fatimah in 1852, when she went to live in a separate house in the same compound. That he does not believe his father ever cohabited with Fatimah after the divorce. That his father said he divorced her on account of her inattention during his illness. He said that his father frequently spoke of the divorce and that it was thoroughly understood in the family that she was divorced.

The witness accounts for the fact of Fatimah's being allowed to remain in his father's compound by the circumstance that her daughters were living there. He further states, that in the year 1865 the daughter Che Mah having left the house claudestinely in which she was living with her mother Fatimah, his father told the witness to go and tell Fatimah "she must leave the house as she was a divorced woman," and that she was accordingly turned out. The witness however states, that Fatimah came to the house four or five days before the death of Noordin. Nonia Soo Eng states, that she lived in Noordin's house as a concubine for 20 years before his death. says that Noordingot angry with Fatimah during his illness because she did not attend to him and that next day he assembled all the women in the house and also two men named Alliar and Hadjee Lebby and directed the witness to bring his bag of Rupees. That he then took three Rupees and giving them to Fatimah said "there's your Taluk! Take your Taluk and go, don't remain here!" That then her daughter Mah Chee came and cried bitterly and said "as you will have nothing to do with her, I will take my mother." That Fatimah then went and lived with her dan thter. The witness stated on cross examination, that Fatimah lived in the same house, on a different side, with her daughter, and that after a year she removed with her daughter to another house built in the same compound. ness states, that all the other witnesses to the divorce are dead except the other Nonia (next witness). Nonia Ugay Eh, another concubine of the Testator, gave much the same description of the divorce, she says, that the Testator gave three Rupees to Fatimah and said

<sup>(</sup>b) Pettifer v. James, Bunbury Rep. 16. Wad. Eccles. Dig. pp. 6-7.

"Here is your Taluk, you and I are no more man and wife," that after taking them Fatimah went downstairs and cried. That her daughter asked Noordin if her mother might live with her. That he said he did not care but that she must leave the house, that the daughter cried more and more and begged her father to relent. And that at length he said his daughter might do as she pleased. That Fatimah then went to live in her daughter's apartment, and afterwards went to live in another house.

The Plaintiff Fatimah altogether negatives the statement of these witnesses and denies in the most positive manner that she was ever divorced from her husband. But, I confess, I don't think any reliance can be placed on her testimony as she pleads complete ignorance of certain circumstances with which it is impossible to suppose that she was not acquainted.

How can it be supposed for instance that she can have been ignorant of the fact, that the belief was prevalent in the household, that her husband had divorced her on account of her inattention to him during his illness.

Then assuming, as I think upon the evidence it must be assumed, that Noordin took care to have the fact of the divorce registered in the Khatib's Book, can it be supposed for a moment that the person most interested in the matter knew nothing of it, particularly when we couple with it the facts that Fatimah removed to her daughter's apartments, and within a year after went to live in another house. The evidence of Tengah Chee Mah, Fatimah's daughter, does not seem to me to be material as she was too young to have known of the divorce at the time it is alleged to have been made.

Then there the evidence of Mahomed Ally, a Khatib or priest of the Mahomedan Mosque. He produces the following papers.

COPY OF DIVORCE.

In the year 1268, on Tuesday in the day time, in the 22nd day of the month of Shawal, in Penang, Merchant, Mahomed Noordin Mericayar's wife's original name was Echee. At the time of the writing of the marriage paper a name was given and she was called Fatimah. Merchant Mahomed Noordin Mericayar gave unto that woman three Taluks and settled. The witnesses thereto are Kasi Haji Hussain, Court Shroff Alliar and Haji Lebby.

Written by Mahomed Salleh son of Nacodah Tomby Sahib.

MAHOMED NOORDIN (in Tamil). MAHOMED NOORDIN (in English).

and says that he saw Mahomed Noordin sign it. The book in which it is written is a Register of Marriages and Divorces kept for the

Mahomedan community. He says, that the entry was made on the day in which it bears date, in Noordin's house and by his desire. The witness stated, that the giving of the three Taluks was sufficient to constitute a divorce according to the doctrine of the Safutes.

The next witness was Hajee Abdul Gunny, a Doctor of Mahomedan law. He stated, that if a man gives his wife three Taluks and says he divorces her, the divorce is good, provided that she heard it. This witness said further that there must be two or three good men as witnesses of the divorce. That these witnesses must say they saw the Taluks given. That if a divorce is in writing, it must reach the hands of the wife. That the entry in the Book is insufficient unless the witnesses should come forward and prove that they were present at the time of the divorce. On further examination the witness stated, that if a Mahomedan husband divorces his wife and there is no witness, still the divorce is good. Evidence was given to show that Mahomed Noordin belonged to the Safute sect of Mahomedans.

The next witness was a Kazi, Haji Mat Shera. He states, that if a man takes three Rupees and gives them to his wife and says," take your Taluk and go," that is a revocable divorce. But if after the husband's death the wife was to deny the divorce; it would not be valid, as there would not be sufficient evidence of it. The witness further stated, that the evidence of two concubines would not be sufficient to prove a divorce. The result of the whole evidence, I think, is, that in the year 1852 Mahomed Noordin was deeply offended with his wife for her alleged neglect of him during his illness, and that in consequence he summoned all the women of the household and other persons as witnesses and in their presence gave her three Taluks and formally divorced her, commanded her to leave the house. but on the entreaty of his daughter he allowed her to occupy a part of her daughter's apartment until she removed to another house. He also appears to have summoned the Khatib of the Mosque and ordered him to make an entry of the fact of the divorce in the Register of Marriages and Divorces, which entry was doubtless intended to be an enduring proof of the fact.

As the Mahomedan law is a foreign law to us and is not as it is in India a certain extent, part of the law of the land, there is some difficulty in ascertaining what the law is in a satisfactory manner. But, I think, it may be sufficiently collected from the evidence of the three learned Mahomedans who have been examined that the divorce spoken of by witnesses Nonia Soo Eng and Nonia Ugay Eh, was a valid divorce according to the doctrines of the Safutes, the sect to which Mahomed Noordin belonged.

It is true that such a Divorce is said to be revocable. It may be so. But there is no evidence that it ever was revoked. The fact that after the alleged divorce, Fatimah left the conjugal apartment and went to live with her daughter in another part of the house, and never again returned to live in the house of her husband (except when her husband was on his death bed) seems to me inconsistent with the supposition that she was ever restored to the position of a wife. The evidence of Nina Noordin who states that in 1864, thirteen years after the alleged divorce, his father told him to order Fatimah to leave the house in which she was living, because she was a divorced woman, shows clearly that Noordin himself considered the divorce as binding and it may be not immaterial to mention as sure evidence of Noordin's estrangement from his former wife and the mother of his children that she is not even named in his Will.

It has also been urged by the Attorney General that there is not sufficient evidence of the divorce, because the two concubines who testify to having been present, are competent witnesses according to Maho medan law. But in my opinion that is no reason why their evidence should not be received in this Court. According to Story (Conft. laws -. 634) "The course of procedure ought to be according to the law of the forum where the suit is instituted. \*\*\* admission of evidence and the rules of evidence are rather matters of procedure than matters attaching to the rights of parties, \*\*\* and therefore they are to be governed by the law of the country where the Court sits." And Lord Brougham states, (in Bain v. Whitehaven Ry. Co. 3. H. L. C. 19.) "As to the stipulations of contracts our Courts are bound by foreign law. But it is a totally different thing as to the law of evidence. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, that it is to be determined by the law of the country where the question arises. where the remedy is so ught to be enforced, and where the Court sits to enforce it."

I therefore think, that the objection to the testimony of the two concubines on the ground of their incompetency cannot be sustained, and on the whole I am of opinion that the plea alleging the divorce has been proved.

I will now proceed to consider those portions of the Will, which have been attacked by the plaintiffs.

The 6th par. of the petition was abandoned by the Attorney General, and need not be considered.

The 7th par states that the Testator by his Will in the third section bequeathed certain personal property consisting of household

funiture, wearing apparel, plate, crockery, jewellery, and other things to two of his natural sons, and in a subsequent section of the Will, the whole of the Testator's personal estate and effects whatsoever, are bequeathed to the Executors of the Will in trust, and the petition goes on to charge that the subsequent bequest of the personalty overrules and renders void the previous bequest to the two natural sons. The sections thus referred to are as follows:—[3rd and 4th Secs. read in extense.]

The contention is, that these two sections are irreconcilable so that they cannot possibly stand together and therefore the 4th section must prevail, on the principle that the subsequent words of the 4th clause are considered to denote a subsequent intention. But this rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render every part of it effective. (1 Jarm 445) Now here we have in the 3rd section, gifts of certain specific parts nominatim of the Testator's personal property, and in the subsequent section a gift of all his personal estate and effects whatsoever and wheresoever. This it seems to me is a case in which the rule, that a devise or bequest in general terms, shall not be held to control another devise or bequest made in distinct terms, may be properly held to apply.

In Borrell v. Haigh (2 Jur. 229.) a Testa trix devised all her messuages, cottages, closes, land and hereditaments at H. to A. and afterwards gave all her copyhold estates and hereditaments at N. and T. and elsewhere. It appeared that the only place besides N. and T. in which the Testatrix had copyholds was H, but Lord Langdale held that the prior devise which clearly carried the copyholds at H. was not defeated by the vague expression which followed. Upon the same principle, I think, the specific bequests in the 3rd section of the Will, are not defeated by the general bequest contained in the 4th Section.

The next question is one raised in the 7th par. of the petition and arises in the 5th clause of the Will.

By that clause, the Testator after certain bequests, directs the residue of the property divided and bequeathed in the 4th clause, to be divided into twenty four equal shares, and he then proceeds to distribute these shares among his children and grandchildren in certain proportions, and gives one of these shares to his grandson Abdul Cader Jellamy. Abdul Cader Jellamy having died in the lifetime of the Testator without issue, it is contended that his share lapsed, and I think, there can be no doubt that his share did so lapse, and that it falls into the general residue of the Testator's Estate.

The next question arises on the 6th section of the Will. By that section the testator devised eleven pieces of land in Penang, particularly described in his Will to trustees, and directed that the lands should be called the "Whahkoff of Mahomed Noordin" and he further directed his trustees out of the rents and profits of the said lands to pay for ever the sum of Twenty Dollars monthly to the managing body of a school in Chulia Street Penang, also the sum of sixty Dollars monthly to the petitioner Tengah Che Mah and her lawful issue during their natural lives, the sum of Forty Dollars monthly for the maintenance of one of his sons and his wife. The Testator then gave the residue of the said devised premises upon trust as follows:-"to expend for the yearly performance of Kandoories and entertainments for me and in my name, to commence on the anniversary of my decease according to the Mahomedan religion or custom, such Kandoories and entertainments to continue for ten successive days every year, and also in the performance of an annual Kandoorie in the name of all the prophets, and to expend the same in giving a Kandoorie or feast according to the Mahomedan religion or custom to the poor for ten successive days in every year, from the anniversary of my decease, to the extent of Three hundred Dollars including the cost of lighting up the Mosque or burial place of my deceased mother and the school-rooms thereto adjoining. And also to give Kandoories or feasts to the poor as aforesaid, once every three months to the extent of One hundred Dollars, and provided there should remain any surplus moneys, then the same is to be expended in purchasing clothes for distribution to the poor."

The petitioners maintain (See 10th par. of petition) that this devise is bad in law, and that the said eleven pieces of land should fall in the residue of the Testator's Estate.

Now this is a devise to Trustees upon certain Trusts which I will take seriatim. First, then there is a trust in favour of a school built by the testator "for the learning in English, Hindostanee, Malay, Tamool, Malabar, and the Alkoran" which seems to me a good charitable gift and therefore perfectly valid. Then there is a trust for the support and maintenance of Testator's daughter Tengah Che Mah, the sum of Sixty Dollars per month, to be paid to her and her lawful issues during their natural lives, for their sole and separate use without power to dispose of the same by way of anticipation. Here the testator evidently intended to make a provision for his daughter and her children. But in the manner in which it is to be carried out is not very intelligible. Prima facie it is a gift to his daughter and her children jointly, but then there are the words "for their and her sole and separate use without power to dispose of the

same in the way of anticipation," and besides there is the commencement of the clause containing the gift in which it is said to be "for the support and maintenance of my daughter Tengah Che Mah," showing that she was the primary object of the Testator's bounty. On the whole I think I shall best effectuate the testator's intention by holding it as a gift to his daughter for life for her sole and separate use, with remainder to such children as were in existence at the time of the testator's death as joint tenants for life. The word "issues" seems to be used in the sense of "children." At any rate it must be construed as a word of purchase and not of limitation, and as only life estates are given to the "issues," I do not think the gift can be construed so as to let in children born after the Testator's Then there is a sum of Forty Dollars per month to be paid to Shaik Meydin for the maintenance of Beebee and Habib Mahomed Merican Noordin in accordance with the terms of a certain marriage Settlement. Upon this no questson has been raised. Then there is the trust of the residue of the rents and profits of the subject of the devise, and I have to express my regret that the question of the validity of these trusts were not more fully argued. The purpose of this trust seems to be of a ceremonial, religious, and also of a fes-They are described by the Testator as "Kandoories and entertainments for him and in his name to commence on the anniversary of his decease according to the Mahomedan religion or custom." In another place he speaks of "an annual kandoorie in the name of all the prophets," and also of a "Kandoorie or feast according to the Mahomedan religion or custom to the poor for ten successive days every year from the anniversary of my decease." The clause concludes by directing that Kandoories or feasts shall be given to the poor as aforesaid once in every three months to the extent of One hundred Dollars and directs that any surplus which should remain shall be expended in purchasing clothes for distribution to This clause was not discussed at any length, and the poor. I have no means of knowing the meaning of the word Kandoorie except from the context, as there was no evidence on the point. But the whole object of this clause seems to be to provide funds for certain ceremonial entertainments to be given in honour of the Testator in accordance with the Mahomedan, religion or custom. As the gift is to last for ever, the question arises whether it is charitable or not, as if it is not, it is void as tending to a perpetuity. No evidence was given to show the nature and object of these feasts or Kandoories, and whether they are enjoined by the Mahomedan religion, and I am therefore left-to form my opinion from the words of the Will itself, and I confess that looking at the description of the objects of the Testator's bounty in the most liberal

manner, it does not appear to me that they can, in any sense of the word, be called charitable. I do not see how it can be of any public utility to give feasts even when those feasts are to be enjoyed by the poor. For although it would be a good charity to give alms to the poor, a feast can scarcely be regarded in the same light. On the whole I am of opinion that the gifts in the clause are not charitable, and that they are therefore void.

The only remaining question on this part of the Will is as to the gift of the surplus monies "to be expended in purchasing clothes for distribution to the poor." When a Testator gives funds for purposes which are illegal or unattainable and gives what may remain after providing for those purposes to a purpose which is legally good, the question of the validity of the gift of the surplus would seem to depend on whether the exact amount to be laid out on the prior purposes is either specified or can be ascert ained ( Chapman vs. Brown 6 Ves. 404., Limbrey v. Gurr 6. Mad. 151.) The language of the testator here is not very clear, but I think the clause may be construed, without doing violence to the language used, by holding that the words "to the extent of Three hundred dollars" apply to the whole preceding clause: -so that there would be an annual gift of that amount for all the purposes previously mentioned. Then comes the gift of . one hundred dollars once in every three months for giving feasts 10 the poor, about which there is no doubt, and then we have the gift of the surplus. If I am right in this construction the testator would have given altogether the sum of Seven hundred dollars annually for the Kandoories or feasts, and the surplus if any should remain was to be expended in purchasing clothes for the poor. According to this reading of the clause the surplus is perfectly capable of being ascertained, and there is therefore no objection to it on the ground of uncertainty, and as the gift seems to me to be a good charitable gift I am of opinion that the gift of the surplus is valid.

The exact question arises upon the 7th clause of the Will. By that clause the testator devises to his Trustees all the rest and residue of his real estate in Penang or Province Wellesley or elsewhere (exclusive of what he had by Deeds of gift given to his children and grand-children) upon the following trusts. That his Trustees should lease or let the said lands for any term not exceeding seven years, and should hold the net income thereof after deducting the expenses of collection and management and divide it into the twenty-four shares which shares were to be held upon trust for the benefit of his children therein after named and their issue. The testator then proceeds to distribute these twenty-four shares amongst his children and grand-children in certain proportions and finally directs as follows:—"I

direct that the annual income of the said share or shares so set apart for my said sons and grandsons and their respective issues in the said trust estate and premises shall be paid to the same son or grandson during his life, and from and after his decase that his said share or shares be held in trust for all such ones in room of his children and remoter issue born in his lifetime at such ages and times as he may by any writing under his hand or by his Will appoint and in default of such appointment &c in trust for all his children who being a son shall attain the age of twenty—one years or being a daughter shall attain that age or marry in equal shares, and if then there shall be but one such child, the whole to be in trust, for such child." Then comes a hotchpot clause and then there are cross-remainders between the different divisees.

Upon this devise the Attorney General has contended in the first place that it is void from remoteness. But I confess, I am unable to see in what manner it violates the rule against perpetuities. The land is given to the Trustees in trust to pay the annual income to his sons &c. for their lives, and from and after their decease to hold their respective shares in trust for all or such one or more of his children or remoter issue born in his lifetime at such ages and times as each of his sons &c. may by writing under his hand or by his Will appoint and in default of appointment &c. in trust for all his children. Now the effect of this devise is to each of his sons &c. a life estate in his share and a power of appointment among his children or remoter issue born in the lifetime of the tenant for life, which, as the appointees are persons competent to have taken directly under the Will seems to me a perfectly good limitation.

The Attorney General then contended that certain of the shares given in the seventh clause of the Will have lapsed.

First as to "one share" which is directed to be set apart and held in trust for his son Mahomed Mashoredin Merican Noordin, and his issue, but in case he should die leaving no issue then his share to go to the use of Abdul Cauder Jellamy and Rajah Bee and their issue in equal shares, and secondly as to the "one share" directed to be held apart, and held in trust for Abdul Cauder Jellamy, and his issue but in case he should die leaving no issue, then his said share to go to the use of Mahomed Mashoredin Merican Noordin and Rajah Bee and their issue in equal shares. Abdul Cauder Jellamy having died in the lifetime of the testator without issue the petitioners contend that the said shares fall into the undisposed residue of the testator's estate. There are two questions here, first, as to the share of Mahomed Mashoredin Merican Noordin. The testator directs that if he should die leaving no issue then his share

should go to Abdul Cander Jellamy and Rajah Bee and their issue. Mahomed Mashoredin M. Noordin has survived the testator and has become entitled to his share, and as the event in which the gift over is to take effect may never occur, it is premature to discuss the question whether the words "die leaving no issue" apply to the contingency happening as well after as before the death of the testator. Secondly, as to the original share of Abdul Cauder Jellamy. testator gives it to his grandson Abdul Cauder Jellamy and his issue. But in case he should die leaving no issue than his said share is to go to the use of Mahomed Mashoredin M. Noordin and Rajah Bee and their issue in equal shares. The petitioners contend that this share has lapsed by the death of A. C. Jellamy in the lifetime of the testator, and that the gift over does not take effect. But it appears to me that this is not so. The testator gives these shares to his children and grandchildren in strict settlement and sub-equently provides for the event of any of his children who survived him leaving no issue to take under the trusts of the Will. Now it appears to me that this furnishes a reason for supposing that the testator in giving over the share of A. C. Jellamy on his death without issue intended to refer to his death in the lifetime of the testator, because the event of his surviving the testator, and having no son or daughter to take his parent's share is fully provided for in the general clause establishing cross-remainders between all the devisees under the portion of the Will. But however this may be, there is high authority for holding that the words "die leaving no issue" apply to death in the lifetime of the testator. The general rule mentioned in Jarman (2 Jarm, 713.) that where the gift is to a designated individual, with a gift over in the event of his dying without having attained a certain age, or under any other prescribed circumstances, and the event happens accordingly in the testator's lifetime the ulterior gift takes effect immediately on the testator's decease as a simple absolute gift, seems to me to apply. I therefore think that there is no lapse in this case and that the gift over takes effect. (a) The petitioners further contend that the gift in the 7th clause of the Will of the rest and residue of the testator's real estate in Penang and Province Wellesley or elsewhere is inconsistent with that contained in the 4th and 5th clauses of the Will by which the testator disposes of all his real and personal estate in Akyab and in the Tenasserim Provinces. But I confess, I am

<sup>(</sup>a) See. In re Kirkbrides' Trust 2 L. R. Eq. 400 Martin v. Martin 2 L. R. Eq. 404. Martin v. Holgate 1 L. R. H. L. 175-also see Vander Hoeven v: Swrin, April 1867, Penang.

unable to see the inconsistency. The words "rest and residue" exclude what the testator has already given, and the effect of these words does not appear to me to be affected by the parenthetical clause, "exclusive of those which I have by Deeds of gift given to my children and grandchildren" I am therefore of opinion that the gift in the 4th and 5th clauses is not affected by the disposition contained in the 7th clause of the Will.

Mr. Woods asked his Lordships' decision regarding the question of costs.

Mr. Bond suggested that the costs should come out of the Estate as the question raised was one of great importance to the Estate.

Mr. Woods submitted that the Plaintiffs having lost their case the Estate should not pay any costs of the complainants.

His Lordship said he would take the matter into consideration and give his decision thereon at a future date.

# 14th MARCH 1872.

BEFORE SIR Wm. HACKETT, Knt. Judge of Penang. In re Halemah and Haminah, Infants.

The pledging a child as a security for debt is invalid as being against public policy, although it might have been valid in the country where made; and the parents might at any time have the child returned to them by Habeas Corpus.

In this case, on the 13th day of March 1872, on the application of Mr. Rodyk on behalf of Hem and Sharartee, the parents of the abovenamed infants, a Writ of Habeas Corpus was granted on Syed Allee and Khatizah his wife, commanding them to bring up the bodies of the said infants on the following day and to shew cause why they should not be handed over to their parents.

On the following day Mr. Rodyk appeared for the parents and the said

Syed Allee and Khatizah in person.

The said Syed Allee and Khatizah. on shewing cause, relied on a document made at Quedah, which purported to be a pledge of the infant Halemah to them as a security for a debt of \$30 due by her parents to them and that the debt was still due and unpaid.

Mr. Rodyk contended that although this document might be true, and although the debt therein mentioned be still due and uupaid, yet it could afford no answer, and could not deprive the parents of the first child, as it was against public policy and the English law, Reg. vs. Smith 22 L. J. Q. B. 116.—He further contended that though such a transaction is valid in Quedah, as is well known to every body, yet, that could have no effect in making it valid here, Hope vs. Hope 26 L. J. Ch. 417.—And as to the second infant he contended that there was not the least prétênce for holding her back from her parents.

The Judge—As to the younger child the case is quite clear, that she must be given up to her parents: and as to the elder child I am perfectly satisfied from the authorities cited, that the contention of Syed Allee and his wife cannot be supported and accordingly order both infants to be handed over to their parents.

The infants were immediately handed over. (a).

<sup>(</sup>a) Also see Vansittart vs. Vansittart 27 L. J. Ch. 289; Walrond vs. Walrond 28 L. J. Ch. 97; Swift vs. Swift 32 L. J. Ch. 394.

#### 24th APRIL 1872.

BEFORE SIR WILLIAM HACKETT, Knt, Judge of Penang. SANDILANDS, BUTTERY and others

v.

THE MUNICIPAL COMMISSIONERS of Penang.

The limitation of three mouths, within which an action must be brought, as is required by the Indian Act 14 of 1856 (commonly called "The Conservancy Act,") applies only when the act or thing complained of, but not when it continues,

This was an action to recover \$1,000, as damages for trespass.

Mr. Bond for the plaintiffs. Mr. B. Rodyk for the defendants.

THE JUDGE.—This is an action to recover damages for trespass. The declaration states, that by means of the buildings erected by the defendants, the plaintiffs have been deprived of their ancient rights, their premises have been

greatly depreciated in value, &c. &c.

The defendants have pleaded several pleas: —1. Not guilty. 2. Not possessed 3. They deny the public highway. 4. That the alleged trespasses were done by and at the plaintiffs' permission and request. 5. A plea on equitable grounds. 6. A plea which they have since abandoned. 7. That the act complained of, was done under the Indian Act 14 of 1856 (commonly called "The Conservancy Act") and that the action was not commenced within three months, according to that Act. The action only depends on the 4th and 7th. pleas, the others are immaterial. Mr. Buttery's letters written in 1867 and 1868 were relied on by the defendants in support of their fourth plea, but I think those letters shew the contrary. I take those letters as a protest to the buildings in question in toto, and come to the conclusion that there was no leave or license whatever by the plaintiffs. The next question is on the 7th plea, and is this, when did the plaintiffs' right of action accrue, and whether continuation of the trespass, does not give the plaintiffs' right of action die et die.

Mr. Rodyk on behalf of the defendants, relied on the case of Wordsworth vs. Harley 1 B and Ad. 391, but I think that case is distinguishable. The subsequent cases seem to overrule it, as Shadwell vs. Hutchinson 4 C. and P. 333, Whitehouse vs. Fellowes 30 L J. C P. 305, I think then on the authorities that the plaintiffs' right of action continues as long as the trespass does, and that the Act applies, only when the trespass is completed, and not when it con-

tinues. The plaintiffs on this waived their right to damages.

Judgment for plaintiffs (damages 1 dollar) with costs.

# The 24th of April 1872.

BEFORE SIR WM. HACKETT, Knt, Judge of Penang.
Koh Boo An. vs: Pungulu Shaik Benan.

In an action against a constable or against a person acting under Act 13 of 1856 or 48 of 1860, it must be distinctly and clearly stated in the declaration, and proved at the trial, that the Defendant acted maliciously and without reasonable or probable cause. If there's any failure in this respect, Judgment must be for the Defendant. So in an action against a Pungulu for assault and false imprisonment the Plaintiff clearly proved the assault and imprisonment, and also that Defendant acted without reasonable or probable cause, but failed to prove malice on his part, the Defendant had judgment.

This was an action to recover \$1,000 as damages for assault and false imprisonment.

Mr. Bond appeared for the Plaintiff. Mr. Logan for the Defendant.

THE JUDGE-This is an action to recover damages for an assault and false imprisonment. The assault and imprisonment were clearly proved. But the question is, was the Defendant justified by Statutes. The Defendant relied on a letter he had received from his superior Officer, and on the 29th Section of Act 48 of 1860, but as far as the letter is concerned, that can afford no justifica-The principal part of Section 29 of Act 48 of 1860, and on which the Defendant relies, is in the following words, "and in every such action it shall be" "expressly alleged in the plaint, that the act complained of was done mali-" "clously and without reasonable orprobable cause, and if at the trial of any" "such action, upon the general issue being pleaded as hereinafter provided," "the Plaintiff shall fail to prove such allegation, he shall be nonsuited, and a" "verdict shall be given for the Defendant." (a) Now in this case I must confess there was no "reasonable or probable cause" but I also think, that the act was not done "maliciously," I think that the letter to the Defendant from his superior Officer, is an answer to charge of malice. The Defendant felt himself bound by his superior's orders, and was not acting of his own accord. words are not in Act 13 of 1856 or any of the English Statutes. The only protection the constables and those acting under the Act, had by that Act, was the notice therein mentioned; but the protection afforded under Section 29 of Act 48 of 1860 is more extensive. The acting "maliciously and without" reasonable or probable cause" must be clearly proved, and it cannot be presumed on the evidence brought forward by the Plaintiff. Judgment for Defendant with costs.

(a) See Police Force Ordinance 1 of 1872 Section 47....S. L.

# 7th May 1872.

Before Sir Wm. Hackett, Judge of Penang. In the goods of Khoo Chow Sew deceased.

The Statutes, 31 Edw 3. c 11, and 21. Henry 8. c. 5, which give a widow a right to administration, extend to the Straits; and although under these Statutes the Court has a discretion, yet, this discretion in general is given in favour of the widow, unless good grounds are shewn for departing from it. The Judge of the Supreme Court has the same powers at the Ordinary mentioned in these Statutes. The words "next of kin," in the Charter and Ordinance, are not to be construed too strictly.

In this case there was a Petition for Letters of Administration filed by Lim Tuan Neoh, the widow of the deceased, against which a careat was entered by Khoo Ghee Boon, the eldest son of the deceased by a former wife. There was also a Petition by the said Khoo Ghee Boon, for Letters of Administration.

against which a Caveat was entered by the said Lim Tuan Neoh.

Mr. Woods for the son.—There are several objections to the widow getting Administration. First, she has no locus standi. The Charter of 1807 at page 24 only mentions the "lawful next of kin." The Statute 21. Henry 8. C. 5. s. 2., which gives the widow a right, does not extend here, it is local and was made for Christians only and not for Pagans. The widow has no right by the Common Law. Henloe's case, 9 Coke. 54, shews a widow has no right. The wife is not the next of kin of the husband, Watts vs. Watts, 3 Vesey 347. The Statute, 31 Ed. 3. C. 11., only mentions the "nearest friend," this was prior to the Statute of Henry 8. The Legislature really meant what they said, when

using the words in the words of the Charter, Clarkes Colonial Law p. p. 430 and 633.; Broom's Maxims p. 6; The India, 2 Maritime cases p. 193.; 1 Morley's Indian Digest 246, s. 64. The maxim expressio unius est exclusio alterius is anplicable. The Court has a discretion nuder the Statute of Henry 8., Fawtry vs. Fuwtry 1. Salk 36. Perhaps the other side will rely on Coote's Pro. Prac p. 81, where it is said, the wife, under the Statute of Henry 8, takes in preference to the children, and that passage cites the case of Conyers vs. Kitson, 3 Hogg. 557, but that case in no way has decided such a thing The same subject is spoken of in pages 83, 167, 168. The next objection is, the widow has in her Petition, under-valued the Estate. The Estate is therein declared to be worth \$100,000 whereas it is really worth \$200,000. Another objection is, the widow has not paid the fee for filing her Petition. Another objection is that the lands belonging to the Estate are situated in different places and the widow being a female, will not be able to look after them as a man could. The son is a man of business and such a man would be preferred. Coote's Pro Prac p 169. The interest of the next of kin is greater than the widow's, and it is but right for the son to have administration. The widow is also not prepared to give security and such a thing cannot be dispensed with. In the Goods of Poores, 34 L. J. Prob.; Dwarris' Statutes p. 533, 578, citing 6 Bing. 561; Clarke's Colonial Law 369, 370; also support the view, that the Legislature really meant what they said, and the same was advisedly inserted and not at hazard.

Mr. Logan (Mr. Rodyk with him). The first objection, as to the widow's having no locus standi, is quite untenable. Webb vs. Needham 1 Adams 494. A great deal was said of the Charter, but it must be remembered, that the Charter does not form the whole law. Ordinance 5 of 1868, (Supreme Court Ordinance) s. 27. does not say to whom Administration is to be granted, so we must fall back on the English law, by which the widow has a right. The 28th Section indeed makes use of the words "next of kin" but does not explain the meaning of these words.

[ The Judge.—What are the words of the Act of Henry 8 ? I am not the Ordinary ? I am bound by the Charter. ]

Mr. Logan. I submit the words "next of kin" in the Charter are not to be construed too strictly, for then they would do injustice in great many cases; for instance, they would divest the husband, who is not a next of kin of his wife, of his right to Administration to her Estate, which by the common law, he is clearly entitled to. It was said the interest of the next of kin was greater than the widows.

I submit it is no such thing, as her share alone will be almost \$93,000, which is nearly half the Estate, whereas each of the next of kin, will only get a share in the remainder of the Estate. The Court, under the Statute of Henry, has a discretion, but this will be given in favour of the widow, unless there are good grounds for departing from it. Williams on Executors 401. In the Goods of J. Davies 2 Curties 628, Conyers vs. Kitson 3 Hogg 557, Atkinson vs. Barnard 2 Phil, 317. Her under-valuing the Estate does not affect her right, as it was not done with an intent to defraud any person. As to the Court preferring a man of business, the 169th page of Coole was cited, but that ought to have been read with the preceding sentence; the author is there dealing with next of kin, and not with the widow, with whom he has done. As between the widow and the next of kin, though the next of kin is a man of business, yet the widow will be preferred. In the Goods of Browning 31 L J.

Prob. 161.

Mr. Woods in reply. The Ordinary is the Governor, and this Court, cannot under the Statute of Henry, grant Administration to the widow. Clarkes' Colonial Law 32. As to the Ordinance 5 of 1868, the Charter, and not the English law, supplies the omission in the 27th section, as it (the Charter) is included in the 4th section of that Act. The practice of the Court is no criterion to go by, as may be remembered, that all along it has been the practice of this Court to entertain suits for restitution of conjugal rights, on the Civil side of the Court, until the objection to the jurisdiction of the Court was formally raised by Mr. Bond in the case of Lim Chye Peow vs. Wee Boon Tek (a) when the Court held, it had no jurisdiction; so the same here, the practice to grant Administration to the widow has never been objected to, and this is the first time the objection has been raised. The maxims cursis curie est lex curie and consenses tollit errorem are not applicable.

Cur. Adv. vult.

27th, Judgment of the Court was delivered.

THE JUDGE.—In this case I am disposed to overrule the objections raised against the right of the widow to Administration. The Charter indeed does not mention the widow, but the practice of the Court has always been to grant Administration to the widow. Abdullah's case (b) (Woods' Oriental cases pl.) By the Charter the Judge of this Court is the same as the Ordinary in England, and the Ecclesiastical Court there, as that constituted by the Charter. By the common law the Ordinary had complete control in these cases.

The Statute, 31 Edw. 3. c. 11., was the first Statute on the subject, and it only makes use of the words "nearest friend," according to the construction of that Statute, Administration can be granted to the husband, or widow, or next of kin. The subsequent Statute, 21. Henry 8. c. 5. then expressely gave the widow a right, the words there, being, "the widow or next of kin," under these words both had a right. These Statutes are still binding and are still considered as law, and I assume both Statutes are in operation here. The Court uniformly granted Administration of wife's estate to husband, unless he divested himself of all his interest. By the Charter the Court of Judicature was constituted an Ecclesiastical Court, the Judge of which had the same powers as the Ordinary. The question here, then is, whether the words of the Charter have restricted the power. All our learned Judges granted Administration on the ground that they were in the same position as the Ordinary, and that the words "next of kin" in the Charter, did not restrict the power of the Court but only meant the possible claimant. Sir Benjamin Malkin, in Abdullah's case, held, that the words were accumulative, and that the maxim "expressio unius est exclucio alterius" was not applicable, and Administration could be granted to the widow under the Statu e 21 Henry 8. c. 5.; and that such right was not taken away by the Charter. The Supreme Court Ordinance is differently worded. The words there are general, and are not so clear as could be wished. It does not constitute the Court an Ecclesiastical Court, the 27th Section states "The Court shall have power to grant Probates of the last "Wills and Testaments of all persons leaving moveable or immoveable proper-"ty in the colony, and to commit Letters of Administration to the effects of "all persons leaving moveable or immoveable property in the colony, who die "intestate, or without naming an executor resident in the colony, or where "executors duly appointed by Will shall not appear to sue out Probate, or

<sup>(</sup>a) see page 282. (b) See page 16.

"where the effects of any person deceased shall not be fully administered," but does not specify the persons. The next section was relied upon, as it simply mentions "next of kin." I confess that this section bears out somewhat of Mr. Woods' construction, it ignores the widow's right, and was urged as proof against her right. I would be slow to come to such a conclusion on ac-count of these general words. Consider the effect of the argument: a husband is not the next of kin of the wife, nor the next of kin of the husband. by the English law, the husband has a right to Administration to his wife's estate: and if the 28th Section of the Ordinance is construed according to Mr. Woods' argument, it would defeat the husband's as well as the wife's right, I cannot take the obscure words of that section to defeat this right, I will not be justified in doing so. The Statutes, 31 Edw 3. c. 11 and 21 Henry 8., are binding in England, and I think here as well, and by those Statutes, the widow has a right: giving then every credit to Mr. Woods for the great learning, research. and ingenuity both in his argument and in detecting this defect, still I am serry I cannot concur in the result of his argument. It is a strange fact there is no written law giving the husband a right to Administration, yet the practice has always been so (a). On the whole then, I think the widow's right is not defeated by either the Charter or the Ordinance, and I grant the Administration to her, she undertaking to give security within a reasonable time.

(a) The husband takes Administration to his wife's e-ta'e, jure mar ti. by the common law, and such, his right is recognized and declared by 29 Car. 2. C. 30 s. 25 and 1 Jac. 2. C. 17. s. 5. see Cootes' Pro. Prac. 81.



### 24th June 1872.

## BEFORE SIR WM. HACKETT, JUDGE OF PENANG.

IN THE GOODS OF KHOO CHOW SEW, deceased.

SEMBLE.—The rule in England that the Administration Bond must be double the value of the estate, is not a complete guide here, as property here is treated as personalty.

This was a motion by Mr. D. Logan on behalf of the Administratrix for the Court to accept three respectable Chinese here in \$15,000 each, and himself in \$25,000, as sureties in the Administration Bond to be entered into by the Administratrix.

THE JUDGE. This will be less than the value of the estate, I think, the English practice is not a complete guide for us. Here, all property is treated as personalty. In England there is no exception to the rule, that the Bond must be double the value of the estate. The question here then is, can I take less than the value of the estate.

Mr. Logan. The Administratrix has agreed to convey to the sons the house in Town in which they are living and the garden at Tanjong Tokong where the deceased was buried, so that at least there is \$30,000 secure.

THE JUDGE. Have you made any valuation on this property.

Mr. Logan. No, but I'll have it done if necessary.

THE JUDGE. Yes, I think, I must have the proximate value of these lands before I can do anything.

Adjourned for the property to be valued.

The sureties were afterwards accepted on the valuation of the lands being produced;

#### 24th April 1872.

BEFORE SIR WM. HACKETT, Knt., Judge of Penang. Ong Cheng Neo vs. Yeap Cheah Neo, and other

Executors and Legatees under the Will of Oh Yro Neo, deceased. (a) In a case of marriage there is always a presumption in its favour, and the evidence of the meaning and significance of custom (such as the Chinese one of carrying lanterns at a funeral) must be so clear as to warrant a person in inferring from it the non-existence of a previous marriage in opposition to such presumption. If a testatrix directs as to the remainder of her real and personal property not already disposed of, that her Executors shall receive and collect the same from all persons whatever and in such manner as to them may seem proper, and directs that they, their heirs, successors, representatives or descendants, may apply and distribute the same, all circumstances duly considered in such manner and to such parties as to them may appear just, and by the other parts of her Will she disposed of the rest of her property upon trust.

Held, that the Executors took this property not beneficially but woon trust and in-as-much as the objects of the trust were not declared it results for the benefit of the next of kin of the testatrix. A direction that a house should be used as the 'family' residence, and should not "be mortgaged or sold" without naming any fixed time, or explaining the word "family," is void for uncertainty, and bring

in restraint of alienation, and tending to a perpetuity

Adirection in a Will to leave to two of the Executors four houses of the testatrix for the period of forty years from the day of the testatix's death at a rent of \$100 per mensem, is a good trust. So is a direction to lend a sum of money to certain persons at a certain interest for the same period, and the interest as it becomes due to become part of her trust estate. So is a direction to renew the same from time to time after the expiration of the period mentioned at such rent and rates of interest as the Executors or their heirs &c might think fit.

QUERY.—Is a direction, that in the event of a person not wishing to reside in a house named, he be allowed to occupy another named house free of rent for a period of forty years from the day of testatrix's death, and after that, the pro-

pertu is to be his, good (b)

A direction that two pieces of land of the testatrix on which the graves of her family are placed shall be reserved as the family burying place and shall not be

mortgaged or sold, is not a charity but void as in perpetuity.

A direction that a house should be built for performing religious ceremonies to the memory of the testatrix and her husband, is not a charity, but void as tending to perpetuity.

#### JUDGMENT.

This is a Suit in Equity brought by Ong Cheng Neo representing herself to be the sister and one of the next of kin of Oh Yeo Neo, a Chinese woman who died in Penang, in July 1870, having previously made her Will, by which the defendants Yeap Cheah Neo, Khoo Kay Chan, Khoo Siew Jeng Neo, and Lim Cheng Keeat were appointed her Executors.

The testatrix, by her Will devised and bequeathed or in the language of the Will, "made over" to her Executors all such property and effects as should belong to her at the time of her death, but in trust always for the purposes thereinafter to be mentioned. The plaintiff maintains that several of the trusts declared by the Will are bad in law and void, and therefore, that the subject

<sup>(</sup>a) See Judgment of the Privy Council upon this case on Appeal

<sup>(</sup>b) This question was re-argued and the clause held void, see 19th Sept. 1872

matters of these trusts are undisposed of by the Will and formed the undisposed residue of the testatrix's estate, and as such ought to be distributed among the next of kin of the said Oh Yeo Neo according to the Statute for the distribution of Intestates' estates, and the object of the suit is to obtain a declaration of the Court to that effect.

The Executors have put in their answer in which they maintain the validity of the trusts of the Will, and deny that the plaintiff is one of the next of kin of the testatrix, Lim Ah Yong and Wee Sah Neo. two legatees under the Willhard demurred generally to the Petition for want of Equity.

The first question in the suit is raised by the third paragraph of the answer which is as follows:—"We deny it to be true that the said Oh Yeo Neo left her surviving as her sole next of kin according to the Statutes for the distribution of the estates of intestates the plaintiff Ong Cheng Neo her sister, and a niece named Lim Choon Gek, and on the contrary thereof we say that the plaintiff Ong Cheng Neo was not the sister nor was the defendant Lim Choon Gek the niece of the said Oh Yeo Neo deceased, and further that they were not, nor was either of them such next of kin at the time of the death of the said Oh Yeo Neo deceased, and we claim the same benefit of this objection by way of defence as if we had pleaded the said matters to the said Petition."

It is admitted that the plaintiff and the testatrix were children of the same mother. Cheah Tuan Neo was married to Ong Sye, the father of the plaintiff, or whether she was only his concubine.

The evidence in support of the marriage is of two kinds-first, the evidence of persons who state they were present at the marriage ceremony; and secondly evidence of reputation. Upon the first point several aged Chinese were called, who stated that they were present at the marriage of Cheah Tuan Neo to Ong Sve about sixty years ago, and that they were always regarded as husband and wife and as such were received in society. Many other witnesses were called by the plaintiff to prove reputation and indeed all the witnesses as well as those for the defendant as for the plaintiff ( with the exception of Khoo Seng Hap whose evidence was unsupported ) concurred in saying that Cheah Tuan Neo was always treated with the respect due to a married woman and was regarded as such. It also appeared in evidence that after the death of Cheah Tuan Neo, the plaintiff applied for Letters of Administration to her, estate, and there upon the hearing of the petition, the testatrix as the eldest daughter of the deceased appeared and herself applied for Letters, but that she subsequently waived her claim in favour of the plaintiff, thus implicitly acknowledging her legitimacy. The plaintiff also proved that the testatrix had procured a tombstone from China for her mother's grave, on which were inscribed the words-"Cheah Tuan Neo, her tombstone, Son, Oh Kok Tean, Daughters, On Yeo Neo, Ong Lim Neo and Ong Cheng Neo," but there was no mention made of any husband. It is stated that it is unusual to put the husband's "seh" or tribe on the wife's tombstone, and the omission of it in the present case is accounted for as follows :-

Koh Teng Choon, the Chinese Interpreter of the Supreme Court, states, that when a woman has one husband the name of that husband is inscribed, but if she has had two husbands, the name of the last husband is placed if there is an agreement between the parties interested, but that if they do not agree, then the name of neither husband is placed. On the whole, I think that if any inference is to be drawn from the inscription on the tombstone it is favourable to the legitimacy of the plaintiff, as all the daughters are described in the same

PENANG. 316

way, and no difference whatever is made between them.

The defendants contended that the evidence of the marriage is insufficient and they rely on the following circumstances: first, that it is not stated by the witnesses of the marriage that any male relative gave the woman away; secondly, that Cheah Tuan Neo was taken when dying from the house of the plaintiff to that of Oh Yeo Neo; and lastly, that at the functal of Cheah Tuan Neo the seh "Oh" (that of the first husband) was inscribed on the lanterns.

Now, in deciding the question of marriage or no marriage in a case where there is evidence that the parties have passed as man and wife for many years it must be remembered that it does not merely depend on the greater or lesser weight of the evidence on one side or in the other or in the balance of evidence as to particular facts. In the case of marriage there is always a presumption in its favour. Semper presumtur pro mutrimonio. As Lord Lyndhurst observed in Morris and Davies (5 Clark and Fin. 163,) "The presumption of law (in favour of marriage) is not to be lightly repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it, must be strong, distinct, satisfactory, and conclusive."

In the Breadelbane Case (L. J. R. Scotch and Divorce Appeal cap. 182,) the connection of the persons whose marriage was in question was in its origin illicit, and yet the House of Lords held, that after many years cohabitation with the reputation of husband and wife, it must be presumed that they had been married although there was no evidence of an actual marriage. It is true this was in Scotland but there seems no reason why the same principle should not hold good generally. As Lord Cranworth observed in that case.—

"By the law of England, and I presume of all other Christian countries when a man and woman have long lived together as husband and wife, and have been so treated by their friends and neighbours there is a prima facie presumption that they really are and have been what they profess to be. If affer their deaths a succession should open to their children any one claiming a share in such succession as a child would establish a good prima facie case by shewing that his parents had always passed in society as man and wife and that the claimant had always passed as their child."

In the present case we have the fact of the marriage proved by witnesses, and even if the evidence of the performance of the marriage ceremony be considered not altogether satisfactory, yet there is clear evidence that after the death of her first husband, Cheah Tuan Neo lived with Ong Sye as his wife and was regarded as such by all her relations and friends. The only evidence to contradict the evidence of reputation extending over a period of about sixty years is that of the witness Khoo Seng Hap, who alleges that the deceased Oh Yeo Neo spoke to him in terms of disapproval of the connection of her mother with Ong Sye and called it a shameful affair but as this is unsupported and is inconsistent with all the other evidence in the case, I don't consider it as worthy of credit.

The presumption which arises from the evidence of reputation extending over so long a period of time, I do not think is rebutted by the facts relied upon by the defendants. The evidence of the meaning and significance of Chinese customs ( such as carrying lanterns at a funeral ) must be much clearer than it has been in the present case to warrant me in inferring from it the non-existence of a previous marriage in opposition to the strongest evidence from reputation. When the status of marriage has subsisted for more than half a century, and children have been born who have always held in the family the

position of legitimate members of that family, it appears to me that it would be most dangerous to hold that status does not in reality exist. except on the clearest and strongest evidence. In the present case, I do not think such evidence has been produced, and I therefore feel bound to hold, that the plaintiff has established her rights as one of the next of Kin of the testatrix.

I now come to the construction of the Will.

The first question argued is, that which arises in the 15th clause of the Will, by which the testatrix directs as to the remainder of her real and personal property not already disposed of, that her executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and directs they, their heirs, successors, representatives or descendants may apply and distribute the same, all circumstances duly considered in such manner and to such parties as to them may appear just. Upon this clause it is contended on behalf of the plaintiff that it is a gift to the executors upon trust and in as much the objects of the results for the benefit of the next of kin of the testate. The defendants, on the other hand, maintain that it is a good gift of the residue to the executors for their own use, and that no trust is attached to the gift.

The question involved in this clause of the Will is one which has often occurred, and upon which there are numerous decisions not very easily reconciled. And indeed considering the nice distinctions upon which the decisions often turn, and the variety of expressions used by different testators, it is not surprising that it should not be easy to deduce the principles, which should guide one in the construction of any particular Will, which must in all probability differ in some respect from any of these, on which decisions have been pronounced.

In construing any Will, the object of course is to ascertain the intention of the Testator, as far as it can be ascertained from the language of the Will itself. And it is the duty of the Court, if the testatator has expressed his intention in clear and apt words and there is nothing in it contrary to the rules of law, to carry out that intention. But if the testator, although he may have dimly shadowed forth what his wishes are, does not express them with the sufficient certainty to enable the Court to carry them out, it would follow, that so far as he has failed to explain his wishes with certainty, he must be declared to have died intestate.

In the commencement of the Will at present under consideration, the testatrix expresses her confidence in certain persons and appoints them her executors; and then give to them all her property and effects whatsoever "but in trust always for that purpose hereinafter to be mentioned." The testatrix then goes on to declare certain trusts of a portion of her real and personal estates, some of them being for the benefit of three of the executors, and some for that of other persons. It is also to be remarked that in the third clause of the Will, the testatrix directs that certain sums of money which were to accrue from the interest on moneys lent, and rents of houses, should as they accrued, "become part of her trust estate," and that there is no subsequent declaration of trust of this portion of her estate, unless the residuary clause is to be taken as such.

The general intention of the testatrix is clearly expressed in the first clause of the Will. Her wish was to make a certain property in Beach Street, the family residence of the families of her late husband and his partner, in perpetuity, so that it might be inalienable, and also to secure the perpetual investment in certain hands, of a large sum of money, which was to be part of her

trust estate. And it is clear that her executors were appointed for the purpose of carrying out these objects.

The Attorney-General for the plaintiff has contended, that the residuary estate does not vest in the executors for their own benefit, because it appears upon the whole Will that the gift was to them only in trust. He relied upon the words "having every confidence in "at the commencement of the Will, and also upon the fact that the property was only given to them as executors, but in answer to that observation, it may be said that there are no such words in the 15th clause. The whole question here seems to me to resolve itself into this, whether the 15th clause is to be read as so intimately connected with the previous part of the Will as that it must be road as continuing the trust, which the tastatrix had previously created, or whether the gift was an independent one and to be construed by its own terms, without reference to the previous part of the Will.

Several cases were referred to by the Attorney General in support of his view,

In Fowler v. Garlike (2 R & My, 232) and Vessey v. Janson (I S. & St. 69), the gifts were expressly on trust, and in Stubb, v. Sayers (2 Kee, 255.) there was an express declaration in favour of the test ator's family. Again in in the Corporation of Gloucestor v. Wood (3 Han. 131.) there was express mention of a purpose of the testator, which could not be ascertained, and in Briggs v. Penny (21 L.J. Ch. 265) there were the words "well knowing that he will make a good use and dispose of it according to my view and wishes". In Salt Marsh v. Barrett (30 L. J. Ch. 853) there was a gift of all the testator's property to his executors charged with the payment of legacies and a direction that all their costs and expences should be borne by his estate, and it was held by the M. R. and L. J. Turner that the executors were trustees for the next of kin. L. J. Knight Bruce however was of a different opinion, and thought they took beneficially. In that case there were legacies to the executors and also a clause of indemnity, which circumstances were held to negative the intention to benefit them. L.J. Turner based his decision not on the words of the clause containing the gift, which he said would be sufficient to give the residue beneficially, but on the construction of the Will taken as a whole.

In Barris v. Fowkes. (33 L. J. Ch. 484) there was a gift to an executor of the residue of the testator's estate " to enable him to carry into effect the purposes of the Will," and R.C. Woods held that it was a gift for something which the devisee was bound to do and that it was therefore a trust.

Mr. Rodyk for the defendants contended that the executors take beneficially; that there is nothing in the 15th clause of the Will to shew that a trust was intended, and that in this respect it differs for the 1st clause. He cited numerous cases in support of his contention.

In Lefoy v. Flood (4 L.J. Ch. Report, 1.) the Will was very special and intricate, and its provisions do not at all resemble those of the Will now in question. In Meredith v. Aeneage, (1 Bim. 542.) there was a gift to the testator's wife "unfettered and unlimited" in full confidence that she would give it to such of his father's heirs as she might think most deserving. It was held that the wife was absolutely entitled for her own benefit. But in that case much reliance was placed on the words "unfettered and unlimited."

But it appears to me that the case which most strongly supports Mr. Rodyk's view of the 15th clause is that of Gibbs v. Rumsey. (2 Ves. and B. 294). In that case the testatrix gave her executors legacies for their care and

by their character of Trustees and Executors and also by their names, the same to be disposed of unto such Person and Persons in such manner, and form, and in such sum and sums of money, as they in their discretion shall think proper and expedient." With the exception of describing the executors by name, the residuary gift in Gibbs, v. Rumsey, is very similar to that which we are considering, and if the matter rested on the 15th clause only, I should feel myself much pressed by the authority of Gibbs v. Rumsey.

But in construing this clause and endeavouring to ascertain what the testator intended. I am bound to take the Will as a whole. Now it is clear that the testatrix was anxious to constitute a large portion of her property into a perpetual trust for the benefit of two families. This clearly appears from the 1st, 2nd, 3rd, and 4th clauses of the Will. In the 3rd clause, she directs that certain annual payments, of a considerable amount, shall as they accrue form portion of her trust estate. But in no subsequent portion of the Will is any disposition made of this trust estate by name. There are two modes of accounting for this, either by the supposition that the testatrix when she had come to the residuary clause, forgot all about her trust estate, or else the residuary gift was to the executors in the character of trustees. It appears to me that the latter of the two suppositions is the most probable. The testatrix commences her Will, expressing her confidence in the persons whom she names her executors, and to whom she gives all her property "but in trust always for the purposes thereinafter to be mentioned." The principal object of her desire seems to have been to keep the bulk of her property together for the benefit of the persons with whom she was living and to carry out this object she selected the four persons whom she named as her executors. Coupling this circumstance with the omission to declare the trusts of the annual proceeds of the rents of the houses and interest of money lent, I am led to think, that when the testatrix gave these persons the whole residue of her estate, it was given to them in order to carry out the wishes which she seemed to have so much at heart, and not merely for their own use. The opinion is strengthened by the circumstance that the gift is, to the "executors" merely and not to the persons by name as was the case in Gibbs v. Rumsey. This circumstance in itself would perhaps not be conclusive, but I think it may be taken as some evidence to show that the gift was fiduciary and not beneficial.

I also think in construing the 15th clause, it is material to consider the clause which immediately follows. By the 16th clause, the testatrix states it to be her wish "that her executors may not be interfered with in the management of her estate, and that any one of them accepting this trust shall be competent to manage it, and that in the management thereof the wish of the majority shall prevail." Now if this clause refers to and is connected with the 15th clause, as I think it is, it seems clear that the executors take the residue as, trustees. Besides if the testatrix did not intend the gift to the executors to be fiduciary; how can we explain the direction in the 16th clause "that if any of my executors, from absence, death, or any other cause become incompetent to act, that the continuing executors appoint other executors or trustees in his or their places and stead." Can it be contended that the testatrix meant to give a share of the residue of her estate to persons whom she might never have known, as might be the case if the executors were to hold the residue to their own use and new executors were appointed. I may also mention that the words of limitation superadded to the gift of the executors, namely "their heirs

PENANG. 320

successors, representatives or descendants," seem to me to confirm the opinion that a trust was intended. The word "successors" used here seems to show, that the gift of the residue was intended to secure to the persons who might from time to time fill the office of executors of the Will, and was not confined to the persons whom the testatrix had named as her executors, and that the gift to them was therefore fiduciary and not beneficial.

Upon consideration of the whole Will, I am of opinion, that this is one of those cases in which a testator shows an intention to create a trust but has not denoted its objects with sufficient certainty. I think, it is clear that the testatrix here wished to perpetuate the devolution of her wealth in a certain way, and that she selected her four executors to carry out her wishes. These wishes she has not expressed, and judging from the indications she has given of her desire in other parts of the Will, it is probable that if she had expressed them they could not be effectuated, but as it is, there being no trust declared of the residue, the executors must be held to be trustees for the next of kin of the testatrix.

I have now to consider the different trusts, which the testatrix has declared, of the property devised to her executors.

The first clause is as follows :-

"As my long experience tells me that nothing tends so much to the prosperity, happiness and respectability of a family, as keeping its members as much as possible together, it is my wish that the four shops or houses left by my late husband, should continue to be the family house and residence of the family of Khoo Sek Chuan referred to above, and also of any part of the family of Lim Keng Wah my late husband now residing in China, who may visit this Island, and that they shall neither be mortgaged or sold." The Attorney General has contended that this clause is void for uncertainty and that nothing passes by it, and I confess that after an attentive consideration of it, I am unable to place upon the clause any construction which can be carried out consistently with the rules of law.

The object of the testatrix seems to have been that the four shops or houses left by her husband should remain in perpetuity, the Family house of the family of Khoo Seck Chuan ( who is dead ) and also of any part of the family of her late husband now residing in China who may visit Penang. Now there are two objections to this clause, first, as infringing the rule against the perpetuities. and secondly, if we are to read the clause omitting the prohibition to sell or mortgage, it is open to the objection of uncertainty. If I am asked what is the meaning of the word "family" here, I must confess, I am unable to place a fixed construction on it, or to say what members of the respective families are included in it, whether the word refers to descendants or whether it also includes collaterals. If any authority were required to show that the word famiby is in itself an uncertain term, it may be found in the cases referred to in Jarman on Wills p. p. 81, 82. But independently of the objection of the uncertainty of the meaning of the word family, there is no term specified for the duration of this family house, either for any life or lives or for any term of years. and it seems to me on this ground also, the trust is void for uncertainty. I therefore feel bound to declare the trust invalid, and the subject therefore falls into the residue of the testatrix's estate.

The second clause of the Will is as follows :--

"With this object in view ( referring to the 1st clause ) I direct my executors, so soon after my death as possible to lease to two of their number named

Khoo Kay Chan and Lim Cheng Keat, their heirs and assigns, the lower story of the said four houses or shops, that is to say, the whole of the shops, warehouses and all other places in the premises, now used for such purposes or that may be added thereto, for a period of forty years, from the day of my death at a rent of one hundred dollars per month, for each and every month, during the said period of forty years. The upper story of the same four houses to be occupied by the several members and descendants of Khoo Sek Chuan and Lim Keng Wah as already proposed."

The Attorney General contended, that this trust is illegal and referred to Attorney-General v. St. Catherine's Hall I A C. 395 when a condition annexed to a gift, that the rents of tenant should not be raised was held void. But that was on the ground of repugnancy and the reason does not seem to me to apply in this case, as we have here no gift to which the lease is annexed as a condition, and the testatrix had a perfect right to make a lease for any number of years she thought fit and at any rent she thought proper. I therefore think, this is a good trust.

For the same reason, I think, the trust in the next clause ( the third) is also good.

By the 3rd clause, the testatrix directs, that the sum of fifty thousand dollars may be given in lean to the renters of her four shops Khoo Kay Chah and Lim Cheng Keat, their heirs and assigns, for the same period of forty years, at the rate of interest of five per cent per annum, to be paid monthly, and she further directs, that this interest and the proceeds of the rents mentioned in the foregoing paragraph, as they accrue shall become part of her trust estate.

The testatrix would have been able to lend this money for any time she thought fit, and if so, of course she could empower her trustees to make a similar loan. I therefore think, that this is a good power given to the trustees and that it is not opposed to any rule of law. The Attorney General seemed to think that the latter part of the clause, contained a direction to accumulate but I cannot agree with him. There is merely a direction, that the interest, and rents as they accrue, shall form part of the testatrix's trust estate, and as there is no declaration of trust, the interests and rents &c, to pass to the executors under the general residuary gift.

The 4th clause directs, that at the expiration of the forty years referred to in the 2nd and 3rd clauses, the executors, or their successors or representatives shall make an arrangement as regards leasing the shops and warehouses, and lending out the fifty thousand dollars similar to those already referred to, and that the same process might be repeated from time to time, and for such periods as the English law might admit of, and at such rates of rent and interest as her Executors, their successors or representatives for the time being might think proper. This clause has been attacked by the plaintiff as bad in law and void, but it appears to me, that is a trust which can be carried into effect.

Nothing is more common in one part of the United Kingdom (Ireland) than the tenure by lease for a term perpetually renewable. This, I apprehend may either be for a term of years or for life. If this be so, and if the testatrix herself could have granted this lease with a covenant for renewal after covenant for renewal after the expiration of each term of forty years and so on for ever, it seems to me that she had power to direct her trustees to do the same thing. I therefore think, this trust is a good one, and the same remark applies to the renewal of the loan of the fifty thousand dollars.

The next clause to be considered is the 7th. By that clause the testatrix directs, that in the event of Lim Ah Yeng not wishing to live in the family house, in that case, he and his family, be allowed to occupy the house in Beach Street No. 424, free of rent for a period of forty years from the day of her (testatrix's) death, after which the property is to become his property or that of his heirs or assigns.

Mr. Rodyk who appeared for Lim Ah Yong, appeared to think that the gift of the fee to Lim Ah Yong was void, and he did not argue the point; but as the construction of this clause does not seem to him to be free from doubt. I propose to give Lim Ah Yong's counsel an opportunity of arguing the question before I give my decision. And as the same question arises in the gift to Wee Sah Neo in the 8th clause. I also reserve my decision on that clause.

The next clause of the Will attacked is the 11th. By that clause the testatrix directs, that her two plantations at Batu Lanchang on which the graves of the family are placed, shall be reserved as the family burying place and shall not be mortgaged or sold. It is contended by the Attorney General, that this

gift is void as being a perpetuity and not a charity.

The law in this question seems to have been rather unsettled. Lord Ellenborough expressed an opinion (See Deo v Pitcher 6 Taunt. 359) that although a trust to repair and, if need be, rebuild a vault and tomb for the testator and his family was not a charitable use with respect to the party's own interment, it was so with respect to that of his family. But the correctness of that opinion has been questioned (See Wms. Exers. p. 1000.) and the tendency of recent decisions has been to the effect, that a gift merely for the purpose of keeping up a tomb or a building, which is of no public benefit and only an individual advantage, is not a charitable use but a perpetuity, and therefore void. (See Thompson v. Shakespear 1 Johns. 612) (Carne v. Ling. 2 de G. F. and J. 75) (Richard v. Robinson 31 Bear. 144.) (Hoare v. Osburn I. L. R. Eq. 585.)

In accordance with the law as thus stated. I feel bound to hold that the

gift of the two plantations is void as in perpetuity.

The next clause to be considered, is the 14th. By that clause, after providing for her funeral expenses, the testatrix goes on " and I further direct, that a house termed Sow Chong for performing religious ceremonies to my late husband and myself be erected on some part of the ground of the four shops or houses already so often referred to, and of such size and description as to my executors may seem fit and proper." It is contended by the Attorney General, that this gift also is void, on the ground that it is perpetual. According to the evidence of Koh Teng Choon, the "Sow Chong" is a sort of house in which the ashes of the deceased are placed, in fact a species of tomb; and that the "Sin Chew" is a tablet placed in this house. This witness speaks with some authority, as he has a Sin Chew in his own house which he says is worshipped.

This question concerning the Sow Chong and Sin Chew was fully investigated in a recent case, ( Choa Choon Neo v. Spottiswoode, reported in Woods' Oriental Cases at Singapore, before Sir Benson Maxwell.) and I am disposed to concur in the conclusions arrived at by that learned judge, that it is not a charity. This gift must therefore be declared void as tending to a perpetuity.



## ► The 10th day of June 1872.

Before His Honor Sir Wm. Hackett, Knt., Judge of Penang.
In the matter of CHEAH AH KOOP an infant.

An infant of 8 years of age will not, at least against the father, be allowed to choose its guardian.

In this case the infant abovenamed was brought up on the application of Cheah Ah Kow the alleged father, on a Writ of Habeas Corpus directed to Cheah Ah Ngoh.

Mr. Rodyk appeared for Cheah Ah Ngoh and contended, that his client was the father of the infant by a kept woman and though the child was illegitimate, still, as has been admitted by both sides, the infant was 8 years of age, the Court could not do anything less than leave the infant to its own choice, and the mother had no right to it; and cited in re Ann-Lloyd 3. M. and Gr. 547.

Mr. Ross appeared for Cheah Ah Kow and contended, that it had been clearly proved, that his client was the father of the child, and not the Defendant Cheah Ah Ngoh, that he, as father, had the right to the child, and it could not, at all events as against him, be allowed any choice, and cited Hurd on Hab. Gor. 527 and in re Alicia Race 26. L. J. Q. B. 169.

THE JUDGE held, that that there was sufficient evidence of Cheah Ah Kow being the father, and as such was the case, the infant being only 8 years of age, could not be allowed to choose his own guardian.

Order for the child to be delivered up.

### 8th June 1872.

# BEFORE HIS HONOR SIR Wm. HACKETT. Judge of Penang.

THE MUNICIPAL COMMISSIONERS, vs : GEORGE PEILE TOLSON.

In every case of highway the facts must be such as are sufficient to shew that the owner meant to give the public a right of way over his soil before dedication by him will be presumed, user alone, for however lengthened a period, is not conclusive, and it may be rebutted either by facts showing that it was not the intention of the owner to dedicate or by showing that owing to the state of the title, dedication was impossible.

In order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an intention to dedicate, an animus dedicandi, of which the user by the public is evidence and no more.

It is not enough to establish the right of the public that the persons using the way reasonably believed from the conduct of the owner, that they acquired a right to it, an actual intention on the part of the owner to dedicate must be shown.

Prima facie there is reason to think that a landing place leading from the sea to a public highway would be also a highway, but such inference is not absolutely necessary, and it might be rebutted by evidence showing that it could not have been dedicated as a highway or that it was in fact not dedicated.

Trustees of land for some special purpose inconsistent with its use as a public highway, have no power, and are incapable to make a dedication.

A highway may be dedicated with obstructions or impediments which if made in an existing highway would be a nuisance, but if the Defendant by his plea claims a whole close to be a highway, he must prove a dedication of the whole as a highway or he has failed to make out his case.

A private right of way will be presumed after several years user, over land granted for some special purpose consistent with its use as a private right of way.

To an action of trespass for breaking down two boards placed against Defendant's gates, Defendant pleads private right of way as to both, and proves this right only as to one. Held, that he had failed to estublish his case, and the Plaintiff must have judgment.

The Judge.—The plaintiffs in the present action are the Municipal Commissioners of Prince of Wales' Island, and the defendant is the manager of the firm of Messrs Lorrain, Gillespie & Co., Merchants of Penang.

The action has sprung out of disputes which have arisen between the plaintiffs and the defendant in respect of the right to use a place called Church Street Ghaut, a passage running from Beach Street to the sea and bounding the premises used by Messrs Lorrain Gillespie & Co. the defendant contending, that this ghaut is a public highway and that he has therefore the right to open gates into it in any part of the adjacent premises, and the plaintiffs denying that the ghaut is a public highway or that the defendant has the right contended for.

The action is one of trespass, breaking and entering a close of the plaintiffs' called Church Street Ghaut, situate in George Town, Penang, and for taking up, breaking down and removing two boards of the plaintiffs' fixed to the said close. For which trespasses, the plaintiffs claim \$100 damages. The defendant has pleaded, first, not guilty; secondly, not possessed; thirdly, a plea of the public highway. The fourth plea has been held bad on demurrer (a) and the fifth plea claims private right of way, by non-existing grants over the close in question.

About the two first pleas there is no difficulty, it is clear that the trespass was committed by the defendant's orders, and there must therefore be judgment for the plaintiffs upon that plea; nor do I think that there is any doubt that the plaintiffs have established a sufficient title to enable them to sustain this action against a wrong

<sup>(</sup>a) The M. C. vs. Tolson, heard on 18th March 1872—not taken.

Trespass is founded upon possession (Graham, v. Peat, 1 East 243, 246., Lee, vs. Stevenson, E. B. & E. 512), and the party in possession will make out a prima facie case sufficient to entitle him to a verdict by proof of such possession in himself and of entry by the defendant. There must therefore be judgment for the plaintiffs in the second plea also. Then we come to the third plea, which is as follows: "The defendant says, that at the time of the alleged trespass there was, and of right ought to have been, a certain common and public highway into, through, over and along the said close for all persons to return, pass and repass on foot and with horses and other catile and with carriages at all times of the year at their free will and pleasure. Wherefore the defendant having occasion to use and using the said way, because the said boards or fences had been and were wrongfully erected across the said highway and obstructed the same, pulled down the said boards or fences which are the trespasses alleged.

The plaintiffs have taken issue on this plea, and I have therefore to decide, whether upon the evidence Church Street Ghant is or is not a highway, as alleged by the defendant. Highway is said to be the genus of all public ways, of which Lord Coke says, there are three kinds, a footway, a foot and a horseway, and a foot horse and cartway. Co. Litt. 56. a. Mr. Smith (2 L. C. 136.) defines it as "a passage open to all the king's subjects," as it is clear that every passage which is open de jure to all the king's subjects must be a highway. The present plea claims a right of passage of the most extensive kind for persons on foot and for horses and other cattle, and for carriages.

A way is usually constituted a public highway by a dedication of it by the owner of the soil to the public use. And this dedication may be presumed from circumstances. Thus, where the owner of the soil suffered the public to have the free passage of a street in London though not a thorough fare, for eight years without any impediment, it was held a sufficient, for presuming, derelection to the public. (Trustees of Rugby Charity vs: Merryweather 11 East. 375). So, where a street communicating with a public road at each end, had been used as a public road for four or five years, it was held; the jury must presume, a dedication (James vs: Dean 3 Bing, 447; See per Mansfield C. J., Woodyear vs: Hadden 5 Taunt. 125).

The defendant's case rests principally upon evidence of user, and it is contended on his behalf that from the uninterrupted user of the ghaut for the last sixty or seventy years, it must be presumed that it was dedicated to the public as a highway.

The plaintiffs on the other hand contended that the title and history

of the ghant explain the user, and rebut the inference which is sought to be drawn from it. They submit that in every case the facts must be such as are sufficient to shew that the owner meant to give the public a right of way over his soil before a dedication by him will be presumed.

Has there then been in the present case, user by the Public for a sufficient length of time of the close in question as a public highway, from which a dedication on the part of the owner, whoever he may be, is to be inferred; and secondly, was the state of the property and the title such as to make such a dedication possible? a great quantity of evidence both documentary and oral has been adduced by both sides in order to sustain their respective views, and I will now deal with the facts so far as they appear to be material to the present question.

In the year 1800, it became manifest to the Local Government of Prince of Wales' Island, that it was necessary to establish an organization for the purpose of laying out and keeping the town in order and accordingly at the suggestion of the then Lieutenant Governor Sir George Leith, the principal European and Native inhabitants of the town met and elected a Committee, which was to levy assessments for the purpose of raising streets and making drains in the new town, which Committee was to be presided over by a Government Officer to be named by the then Lieutenant Governor. This Committee was aided in its efforts by the Government which gave money and land to assist them in carrying out their views. meeting of Committee held on the 4th January 1801, estimates were proposed for making streets and drains, and it was also proposed that a ghaut should be made opposite to street leading out of Beach It is important to bear in mind, that at this time the land on the seaward side of Beach Street was still unappropriated and was called a mud-bank, and one of the objects of the Committee seems to have been to have this mud-bank covered with "puckah godowns." The Committee therefore asked the Government for permission to sell this land, reserving sufficient space for the markets. The Government having given the necessary permission, it appears from the records of the Municipality, that the mud-bank to the eastward of Beach Street was put up for auction, in lots, and sold in the month of February, 1801. The land, upon which the godowns of Messrs, L. Gillespie & Co. stand, was puchased by a Mr. Perkins, as well as the ground which now forms Church Street Ghaut. on the 30th of March subsequently the ground now forming Church Street Ghaut was repurchased by the Committee from Mr. Perkins, for the purpose of making it into a Ghaut opposite to Church Street.

At the same meeting of the Committee when the Church Street Ghaut was repurchased, it was resolved that a wall of three feet wide and three feet high should be made between the ghaut and the adjoining ground as soon as possible.

It is important to recollect, that at this time (1801) the town of George Town, properly so called, was not yet actually in existence. It existed in great measure only on paper, in the designs of the Surveyors. That which is now the Eastern side of Beach Street, a line of shops and godowns filled with merchandize, was only an unsightly bank of mud, unavailable for any useful purpose until it should be filled in and reclaimed. The Ghauts or at least many of them existed only in name, and the streets to the West of Beach Street were still in process of formation. This is clear from a resolution of the Committee of Assessors of the 30th August 1801, "That the Company's convicts be ordered to finish Bishop Street and Church Street, after which Mr. Brown be allowed 30, and that the remainder of the convicts be employed upon the ghauts," and on the 28th September following, we find the Committee approving of a contract for filling up the Chulia Street Ghaut. 23rd November 1801, it was agreed that two hundred and fifty dollars be paid for filling up the Prison Ghaut, and on the same day it was resolved that a wall should be made between the Ghaut at the end of Church Street and Captain Farguharson's premises, one half to be paid by the Commissioners and the other half by Captain Farquiarson's Agents. It may be remarked that in the Grant of the Church Street Ghaut, it is described as being bounded on the South by Captain Farquharson's land, which would be the site of Messrs Lorrain Gillespie and Co's godowns.

To proceed with the history of Church Street Ghant, we find the Committee of Assessors in their meeting of the 25th June 1802, requesting that an application should be made to the Government for Grants to the Public of the landed property belonging to them in George Town, and that the Grants be made in the "names of the Public at large, them and their administrators in succession." In accordance with this request, on the 2nd October 1802, the Lieutenant Governor issued Grants of the land which had been reserved for the purpose, to the inhabitants of George Town, to them and their representatives in perpetuity. The Grant of the Church Street Ghaut has been produced from which I take the following details. George Town is described by the following boundaries: "From the Northeast angle of the point extending along the sea beach to the Westward of the Penang Road and including all grounds beyond the Penang Road which enter immediately upon it. From the beach

in a Southerly direction to the First bridge, from thence following the Northern Bank of the Prangin in an Easterly direction to the sea, and from thence along the East side of the town to the North East point." The grant is stated to be "for the express purpose of establishing a ravenue to be applied to the repairing Streets. Ghants and other public works in the said town," and the subject of the grant is described as "a piece of ground situated on the East side of Beach Street denominated Church Street Ghaut George Town. bounded to the Eastward by the sea and measuring on that side thirty eight feet; bounded to the Westward by Beach Street and measuring on that side thirty eight feet, bounded to the Northward by Messrs Abbott and Maitland's ground and measuring on that side one hundred and thirty feet and bounded to the Southward by Captain Farquharson's ground and measuring on that side one hundred and thirty feet, but without power to sell or dispose of the same unless required by Government."

The grants of the other ghauts were mutatis mutandis in the same terms as that of the Church Street Ghaut.

In connection with the grants of the Ghauts it may be convenient to refer to the title deeds of Messrs. Lorrain Gillespie & Co., which have been put in by the Defendant, and to the argument which defendant founds upon the terms of those deeds. The original grant is dated the 2nd November 1801, eleven months before the date of the Grant of the Church Street Ghaut to the inhabitants of George Town. It is a grant by the Lieutenant Governor of Prince of Wales' Island to the Executors of Mr. John Perkins, and it describes the ground as bounded to the Northward by Church Street Ghaut, and measuring on that side eighty five feet.

Upon this description Mr. Bond has founded the argument, that at the time of the grant, Church Street Grant was already in existence and had probably been in existence for some time, and that the natural inference is, that it had been previously used as a public ghaut or means of access to the sea, and consequently that it had been dedicated to the public as a highway, and was in effect a highway at the time the grant was made (2nd November 1801).

Much stress has been laid on the word ghaut, as shewing that the place was for the use of the public. The word ghaut or ghat is, I believe Hindoostanee, and whatever its literal meaning may be (in one dictionary I see it defined as "an entrance to a country"), it seems to be used here and in Calcutta to mean a landing place. Now I quite agree, that primâ facie there is some reason to think that a landing place leading from the sea to a public highway would be also a highway, but I do not think that the inference is absolute-

ly necessary, and I think that it might be rebutted by evidence shewing that it could not have been dedicated as a highway or that it was in fact not so dedicated.

In the present case, it is clear from the documentary evidence, that in the year 1801, the town was only in process of formation; the streets and drains were designed, but were not yet made, and the bank to the eastward of Beach Street was not yet filled in and as to the Church Street Ghaut, up to the 30th March 1801, it formed a portion of the land purchased from Government by Mr. Perkins, and then repurchased from him by the Committee of Assessors, so that it is clear, that any presumption, that it had been for sometime previously used as a highway, is conclusively rebutted

We have now arrived at the period when the land on which George Town stands, which had been up to that time vested in the Local Government, was transferred by them to the persons who had purchased from the Committee of Assessors. The Committee of Assessors was appointed by the people, with the exception of the Chairman who was nominated by the Government, and to this Committee the Government entrusted power to lay out the town in the manner most suitable to the requirements of the inhabitants. With this subject in view, the Committee were authorized to form streets. to sell the adjacent lands in lots and to establish a system of drainage. The Government also consented to make the inhabitants of the town a present of certain reserved loss adjacent to the sea which were called Ghauts and which we may therefore suppose were intended to afford the inhabitants of the town access to the sea at several different points in the town. It seems to have been thought desirable wherever Beach Street was crossed by a principal street. that there should be a ghaut which should afford a direct approach to the water. This, I think, appears clearly from the original plan of town referred to in the Municipal Documents, in which the ghauts are called the public ghauts.

It appears, from what I have said, that the Government land which now forms George Town, was dealt with in these different ways by the Committee of Assessors, with the consent of the Government. First, the streets were laid out and implicitly dedicated to the public. Then there was the land which was allotted to purchasers who obtained Grants from the Government; and lastly, there were the lots reserved by the Committee of Assessors for the use of the inhabitants of George Town, and called public ghauts, for which also Grants were issued by the Government.

It has been argued by Mr. Bond, that these public gliants as they were called, could have been only ghants for the use of the public,

and therefore highways. But, it appears to me, that although the glauts were clearly intended for the benefit of the inhabitants of George Town, it does not follow that they were on that account to be regarded as highways of the same nature, as the streets of the town. The history of the formation of the town shews, that the ghauts were regarded as something different from the streets. The streets were laid out and designated by the name of streets, and dedication was presumed. If it had been intended to constitute the ghauts into mere highways, nothing would have been simpler than to have mapped them out, and called them by the names of streets or lanes or ghauts, and the dedication would have been presumed.

But here we have first a reservation of certain lots, afterwards called ghants and then a formal grant of these ghants to the inhabitants of George Town for certain special purposes.

I think therefore, that it appears from the way in which these ghauts were originally created, that although they were undoubtedly formed for the benefit of the inhabitants, partly no doubt to afford them easy access to the sea, that they were not intended to be merely highways or streets. The terms of the ghauts themselves leave no doubt upon that point.

The object of the grant is expressly for the purpose of raising a revenue to be applied to the repairing streets, ghants or other public works in the said town, an object quite inconsistent with their dedication as highways in the ordinary sense of the word. It may be quite true, and probably was the case, that the ghants were intended as passages to the sea; but if they were once dedicated to the public as highways in the ordinary sense, and in the only sense which can benefit the defendant, it would clearly be utterly impossible to raise revenues from them in any way, no mode of raising a revenue could be derived, which would not amount to an obstruction in the case of a highway.

The truth seems to be, that it was thought, that the assessments necessary for the making of the streets, drains and other public works of the newly formed town, would press heavily on the people, and the ghauts were granted to the inhabitants in order to relieve them from excessive assessments. And it appears from the records of the Municipality, that from the commencement the Committee proceeded to utilize some of the ghauts by erecting rice bazaars and other markets on them, but there is no evidence that Church Street Ghaut was used in the same way, or that any revenue was derived from it until many years afterwards. I find however, in the early records, valuations of the property of the Committee of Assessors, in which the Ghauts are valued as forming part of the

assets of the Committee. There is one of the 31st December 1802, in which Church Street Ghaut is put down, as worth \$500.

In April 1806, I find another valuation, in which Church Street Ghaut is put down, as worth \$1000.

Some of the glauts continued to be rented down to (according to the Municipal documents) the year 1836 or 1837, but they do not appear to have yielded an increasing revenue, as I find that in the assessors' accounts for the year 1814, they are represented as producing only \$\mathbb{g}\$ 104 a year, being less than the rents obtained in the first years after their formation. It is clear, therefore, whatever the causes may have been, that in the earlier days of the history of George Town, the ghauts were by no means a profitable property for the inhabitants, and did not go far to realize the objects for which they were created.

I will now consider the evidence of user, upon which Mr. Bond relies, as raising the presumption of the dedication of Church Street Ghaut as a highway.

The evidence on this point is not so old as the documentary evidence, and does not extend further than about the year 1810. Mr. Ibbetson, who was formerly Governor of the Settlements, recollects Church Street in the year 1810, when the Government offices Ghaut were placed in the premises occupied by Messra Lorrain Gillespie & Co. According to his evidence, the ghaut was then used as a thoroughfare by the public, and there was no obstruction to such user. He does not recollect that the ghauts were under any control.

Then we have the evidence of Mr. Rodyk, who was in the employment of the Government in the year 1809 and remembers Church Street Ghaut. According to his evidence the Church Street Ghaut was in a very bad state of repair. It was, he says, muddy, Boats used to come alongside the ghaut and land their goods. There was a small Tannah (Police Station) in each ghaut to prevent gambling. He always knew the ghauts to be used as public thoroughfares and has seen carts going down the ghauts.

Mr. W. Lewis, formerly Resident Councillor at Penang, and residing here ever since 1826, has known the ghauts ever since his arrival as public thoroughfares. He states, that in his time they were never let. On cross-examination, he stated that he recollected the Church Street Ghaut being made use of as a sort of Police compound, that there were always large quantities of bricks and firewood in the Church Street Ghaut.

Mr. Nairne, a resident in Penang since 1834, who has godowns adjacent to Church Street Ghaut, states, that he has always known

Church Street Ghant to be used as a thoroughfare for landing and shipping goods, that he has seen carts go up and down, and that he never knew of any obstruction. On cross-examination, he stated the ghants have been let out for different purposes, that he was a Municipal Commissioner from 1855 to 1859, and that during that period Church Street Ghant was let out, subject to a right of way for people in the middle, that the sides of the Church Street Ghant have been constantly obstructed by bricks being placed against his wall, and that he remonstrated against the obstruction, that he had one gate opening on the ghant, and that he wished to open another lower down, but that he had no right.

Mr. Magness, formerly Inspector of Police, recollects the Church Street Ghaut since 1847. He states, that he has seen people and carts go up and down the ghaut without any obstruction, and also that he has seen bricks piled up in the ghaut opposite to the defendant's godown; that he considered the ghaut a thoroughfare, as he had constantly seen people going up and down.

Mahomed Hashim, a native Clerk in the employment of the Municipality, states, that he remembers when the Municipal Office was in the building adjoining Church Street Ghaut in Mr. Mitchell's time (previous to 1849); that he recollects collecting rents for Church Street Ghaut for bricks, boats and firewood stored there; that carriages and carts used to be registered in the ghaut; that people were in the habit of using the ghaut as a thoroughfare.

Mr. W. Padday, a resident of Penang for the last twenty six years, states, he has always known Church Street Ghaut to be a

thoroughfare.

Mr. Vappoo Noordin, a native of Penang and a Municipal Commissioner, about forty years of age, states, that as long as he can recollect, the ghauts have been used as public thoroughfares for carts as well as for foot passengers.

Mr. Raphael Jeremiah recollets Church Street Ghaut for more than fifty years. He states, that the ghauts were used by the public for landing goods and as public thoroughfares; and that there used formerly to be a watchman's box in each ghaut, he states, that in rainy weather the ghauts were muddy, and that it was difficult to pass through them at such times.

Abdul Wahid was in the employment of the Committee of Assessors forty years ago, and knew the Church Street Ghaut well. He states, that as long as he can recollect, goods have been landed at the ghauts, and people used to go up and down the ghauts at pleasure. He stated, that the Custom House was in Messrs Lorrain Gillespie & Co's premises, and that goods, were landed at the ghauts

and taken through the Custom House.

Hoosainsah, a Government pensioner, remembers Messrs Lorrain Gillespie & Co's premises more than thirty years ago when the Custom House was there (this was in 1816) he states, that during his time in Penang, the ghants were always used for landing goods and as a public thoroughfare.

Chin Ah Heng, a Carpenter, states, that for the past twenty years he has been in the habit of getting his wood from the seaside over Church Street Ghaut, and that he has never been interfered with in so doing. This witness called the ghaut by the name of lane. He stated in cross-examination, that he was in the habit of carrying his timber through the centre of the ghaut, and that as long as he could recollect there were bricks and stones on the sides of the ghaut.

Keat Heap and Mr. Gentle gave evidence of the user of Market Street and China Street Ghaus.

Mr. M. A. Anthony stated, that the China Street Ghaut has always been used in the same way as any of the Streets; and that it was a regular stand for buffalo carts. In cross-examination he stated, that the ghauts were kept in a very bad order.

Lim Sin Kay, a Chinese Merchant, stated, that he knew the ghauts for the last thirty years, that they were used as public thoroughfares but that they were much neglected.

Ibrahim, a timber Merchant in Rope Walk, states, that he has stored timber in the Chulia Street Ghaut, ever since 1825. That he has seen carts going up and down the ghants and goods landed and shipped, and that they were used as public thoroughfares. He afterwards said that there was a dispute about his placing timber in the ghaut, and he got permission to do so; that it was decided that he might leave the tim ber on the ghaut until it should be carted away.

Mr. Herriot, one of the Municipal Commissioners, a resident in Penang for thirty four years, gave evidence as to the user of the ghauts generally, but stated that they were never repaired in the same way as the streets or roads.

Ong Ah Thye, Spirit Farmer, was in the habit of importing Molasses from Province Wellesley and used the Church Street Ghaut for a landing place for twenty years past.

Ong Choon Swee, an importer of rice, has known Church Street Ghaut to be used as a thoroughfare as long as he can remember (he is now fifty two)

Several other Chinese Merchants testified to the general uses of the ghauts, for landing and shipping goods for the last thirty years, and stated, that it would be a great inconvenience to the public if the ghauts were closed.

Mr. Peel, the Government Surveyor, gave evidence as to the present state of the Ghauts. All the Ghauts would seem to be obstructed in various ways, some by wood, stones and bricks, some by boats, and many of them by buildings. None of them seem to be free of obstructions of some sort, such as in a highway would be deemed nuisances, He describes St. George's Ghaut, as being encumbered with pipes, boats, carts, wood, planters' firewood, some sheds, and in the lower part an open drain. All the Ghauts, St. George's Ghaut included, are described as being in a dirty state.

Mr. Eagleshame, the Acting Secretary to the Municipal Commissioners, states, that the Ghauts were used for storing various articles, such as timber, firewood, brick and lime.

Mr. Presgrave, Secretary to the Municipal Commissioners, states, that the Ghauts were rented down to 1836 But as I have already said, it does not appear from the records that Church Street Ghant was amongst those which were rented. The witness read a resolution of a general meeting of the land-holders of George Town on the 3rd July 1805, in which there was the following recitals. "It having been taken into consideration, the best mode of keeping the Ghauts and streets clean and in repair, and the rents of the property belonging to the public appearing to be 1.380 dollars per annum," the resolution then went on to approve of a proposal for carrying out of the proposed works. He also read a resolution of the Assessors, of the 6th August 1805, according to which the renters of Armenian Ghaut were to be charged \$ 15 monthly. According to the evidence of Mr. Presgrave, the idea of raising a revenue from the Ghauts seems to have been revived in 1851, when the then Committee began to think seriously of making the Ghauts a valuable source of income to the town, but they seem to have been doubtful of their town powers, and the matter seems to have been discussed for some years. At length they seem to have obtained a legal opinion, and in 1859 Church Street Ghaut was rented. It does not seem however to have been the intention of the Commissioners to stop up the Ghauts and they appear all along to have believed that the public had a right of passing over the Ghauts, and that they were to be rented subject to the public right of passage. Mr. Presgrave states, that the Ghauts were kept up in a certain measure but that they were not repaired in the same way as the highroads. He also states, that during his time (over twenty years) he has seen the Ghauts constantly obstructed by bricks, timber and other things.

We find scattered through the records of the Municipality various notices which show that the Ghauts were not altogether ne-

glected. On the 24th July 1808, there is an advertisement for proposals of repairing the streets, wharves and drains. On the 2nd November 1809, there is a notice cautioning people against allowing stones, red earth, firewood, &c, landed at the jublic Ghauts, to remain there more than twenty four hours. And in October 1808. there is reference to the collection of the rents of Ghants in Beach Street. In August 1801, it was proposed to the Committee of Assessors by the Government, that they should fill up and carry out the public Ghaut between the Custom House and Mr. Hallyburton's premises ( Church Street Ghant ); and as it was stated to be a work which would materially benefit the public, it was agreed that the Committee should on their part carry out the puckah drains. as being a fair proportion of the expenses to be horne by them. On the 4th December 1811, we find that Mr. R. Caunter is desired by the Committee to get the drain made in Church Street Ghaut, as soon as possible, as the Government intend filling up and carrying out that Ghaut as soon as the drain is completed. From the two last entries, it would appear that as late as 1811, Church Street was not yet filled in, and that the work was ultimately done by the Government. In 1813, it seems that Church Street Ghant had been added to, as there is a complaint made by Mr. Hallyburton, on the 19th February 1813, of the damage done to his premises in consequence of the addition.

On the 5th October 1814, the Government wrote to the Committee of Assessors, prohibiting Attap sheds being built on the public Ghauts, and directing that all buildings of that description then standing should be immediately removed.

I have now mentioned the parts of the evidence, which appear to me to affect the question of user. And I think, that the general result may be shortly stated as follows: that ever since 1810. Church Street Ghaut, as well as the other Ghauts, has been used as a thoroughfare by the public, both for carts and for foot passengers. that there was never any attempt to obstruct the public in the exercise of this user, but as far as can be judged, ( for the evidence of the case is necessarily somewhat vague, as it rests on the testimony of witnesses depending on their recollection of facts many years old ) the Ghau's were in a dirty state, (Mr. Rodyk said, that in 1810. Church Street Ghaut was in a very bad state; that it was mud and Raphael Jeremiah gave evidence to the same effect ) and could not have been repaired in a way in which the streets of a town are usually repaired and that they were constantly encumbered by various articles, such as bricks, firewood, &c, and in many cases by sheds. It also appears from the evidence that while Market

336

Street, Chulia Street, and Armenian Street Ghauts were rented for various purposes, Church Street Ghaut was not rented out until 1859, at least it does not appear from the Municipal Records that it ever was rented until that date.

Upon this evidence Mr, Bond contends that it must be presumed that there was a dedication of Church Street Ghant to the public as a highway, not merely that the public had acquired a right of passing over a complete and absolute dedication of the whole soil of the ghant so that it could not be used for any other purpose.

Now assuming that the evidence of user if unrebutted by other evidence would be sufficient to raise a presumption of the dedication of Church Street Ghaut as a public highway, I will proceed to consider the grounds relied upon by the Plaintiffs, as showing that there was and could have been no intention of dedicating the close

as a highway.

First, it is urged by the Plaintiffs, that in every case the facts must be such, as are sufficient to show that the owner meant to give the public a right of way over his soil before a dedication by him will be presumed, and that the user is not conclusive. Thus in Woodver v. Haddon ( 5 Taunt. 125. ) where the plaintiff erected a street leading out of a highway across his own close and terminating at the edge of the Defendant's adjoining close, which was separated by the defendant's fence from the end of the street for twenty one years, during nineteen years of which the houses were completed, and the street publicly watched, cleansed and lighted, and both footways and half the houseway paved at the expense of the inhabitants; it was held that the street was not so dedicated to the public, that the defendant pulling down his wall might enter it at the end adjoining to his land and use it as a highway. Cases were also cited to show that nothing done by a lessee without the consent of the owner of the fee, will give a right of way to the pub-Thus in Wood v. Veal ( 5 B, and A. 454, ) which was an action of trespass, &c., there was a justification under a public right of way, it appeared that the place in question, which was not a thoroughfare, had been under lease from 1719 to 1818, but had been used by the public as far back as living inemory could go; and had been lighted, paved and watched under an Act of Parliament, in which it was mentioned as one of the streets of Westminster; and that the plaintiff , who enclosed it after 1818, had previously lived for twenty four years in its neighbourhood. But it was held, that even under these circumstances the jury were justified in finding that there was no public right of way, in-as-much as there could be no dedication to the public by the tenant for ninety years nor by any one, except the owner of the fee.

The general principle, to be derived from the cases, seems to be. that in order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an intention to dedicate an animus dedicandi, of which the user by the public is evidence and no more. But it is sufficient to show that there has been such a user by the public as satisfies the Court or jury that a dedication to the public was intended by the owner whoever he might be. In Reg v. East Maxll. (11. Q. B. 887.) where a road had been originally set out under a private inclosure Act over part of the waste of a manor, and had been used by the public generally ever since it had been so set out, being a period of fifty years and a portion of the waste had been allotted to the lord in respect of his interest in the soil, it was contended that the soil of the road had been taken out of the lord and transferred to no other person and that therefore there was no owner or none against whom a dedication could be presumed, for that there must have been an owner who knew that he was so or his consent to the public user could not be presumed; and that if the Crown were the owner stronger evidence would be necessary to raise a presumption of a dedication that if the owner had been a private person. But the Court of Queen's Bench held, that a dedication might be presumed even against the Crown from long acquiescence in public user, and that the jury were rightly directed to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that he intended to dedicate a highway to the public. Lord Denman C. J. there observed, "Enjoyment for a great length of time, ought to be sufficient evidence of dedication unless the state of the property has been such as to make dedication impossible." In Reg. v. Pettie ( 4 E. and B. 737 ) it was laid down that when there is satisfactory evidence of such user of a road, as to time, manner and circumstances as would lead to the inference that there was a dedication by the owner of the fee, if it was shown who he was, it is not necessary to enquire who the individual was from whom the dedication necessarily interred from such user first proceeded; and when such user is proved the onus lies on the person who seeks to deny the inference from it to show negatively that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed. It is however to be observed, that it is not enough to establish the right of the public that the persons using the way reasonably believed from the conduct of the owner, that they acquired a right to it; an actual intention on the part of the owner to dedicate must be shown. The last proposition is supported by the cases of Banaclough vs. Johnson 8 Ad. & E. and

Ferrand vs. Milligar, 7. Q. B. 750. On the whole, I think, the cases , show that user alone, for however lengthened a period is not conclusive, and that it may be rebutted either by facts showing that it was not the intention of the owner to dedicate or by showing that owing to the state of the title, dedication was impossible. I now come to the consideration upon which the plaintiffs' counsel mainly rested and which may be stated thus; that Church Street Ghaut was the subject of a charitable trust, and that in-as-much as its dedication as a public highway was inconsistent with the purposes of the trust, that a dedication could not be presumed. that Church Street Ghaut was granted to the inhabitants of George Town, for the express purpose of establishing a revenue for the repairs of the streets, ghauts and other public works, and that as a dedication of the ghauts as a highway would be a breach of trust on the part of the trustees which would not be implied and therefore that the presumption of dedication is rebutted.

It has been objected by Mr. Bond in the first place, that the grant which creates the charitable trust is void and therefore the major premiss of the argument is unsound. The grant in the present case being to the inhabitants of George Town and their representatives in perpetuity, it is argued that the gift is void, in-as-much as the Inhabitants of George Town are not capable of taking by grant being unincorporated. For this position he relies upon the passage in Duke, (Duke's Charitable Uses p. 134) where it is said "that a gift to a parish by deed to a charitable use is void, but a devise by a Will is good." It appears to me that this passage must mean that the grant is void at law as it is laid down in Sheppard's Touchstone p. 237. "If a grant be made to the parishoners of Dale ( of land ) it is void, and so also of a grant of land to the Church Wardens of a parish." But grants of a charitable nature have always been supported in Equity, see Duke, p. 355. "But this we are to take as out of question, that a deposition of lands, rents, money, goods, &c may be by act executed in a man's lifetime, or by his Will at his death to charitable uses, within the intent and purview of this Statute (Stat 43 Eliz) \* \* \* Albeit there be defect in the deed, or in the Will, either in the party trusted in the use where he is misnamed, or the like; or in the parties for whose use &c. \* \* \* And therefore if a copyholder doth dispose of a copyhold but to the charitable use without a surrender citing Tufnel v. Page 2 Aik. 37: and in divers such like cases, when the donor is of capacity to dispose, and hath such an estate as is any way disposable by him, this Statute shall supply all the defects of assurance," and in page 356, Duke: "It both been agreed and resolved to be within the intent and purview to this Statute \* \* \* \* to order and decree the same in all the case hereafter following; that is to say \* \* \* \* \* where one gives land to the church wardens of a parish ( who are by law not capable to take it by grant ) to charitable uses \* \* \* So where land is given to repair highways to the parishoners of Dale." It appears therefore from the passages in Duke last cited, that when there is a defect in the assurance creating the trust from such a cause as the grantee being incapable of taking, that a Court of Equity will step in and aid the defect in favour of the charity. The question arose in the case of Christ's College Cambridge, 1 Wm. Blackst. 90. In that, case it appeared that Mr. Tancred by deed, conveyed his estate to Geoffees, to the use of himself for life, remainder to his first and other sons in tail, remainder to certain officers of Christ's College, to maintain certain students there in the sciences of physic and divinity, and four students of law at Lincoln's Inn. By his Will he confirmed the deed, but fearing the Statute of Mortmain might defeat it, he ordered in case the said uses or any of them should be contrary to law, the estates so settled should go to other objects. On an information by the Attorney General to establish this charity, there arose two questions; the first of which was, whether this was a conveyance to charitable uses under the Statute Eliz, and therefore to be aided by the Court of Chancery. Lord Henley ( then Lord Keeper ) said, "The conveyance is admitted to be defective, the use being limited to certain officers of the corporation and not to the corporate body; and therefore there is a want of persons to take in perpetual succession. The only doubt is, whether the Court should supply this defect for the benefit of the charity under the Statute of Elizabeth. And I take the uniform rule of this Court before and after the Statute of Elizabeth, to have been, that where the uses are charitable, and the persons has in himself full power to convey, the Court will aid a defective conveyance to such uses."

I think there can be no doubt the purpose for which Church Street Ghaut was granted constituted a good charitable trust (see Atty. Genl. v: Heclis, 2 S. and St. 76; Visct. Girt v: Atty. Genl. 6 Dowl. 136) and therefore that the defect in the grant would be aided by a Court of Equity. For this reason I think that Mr. Bond's objection although valid as regards the legal effect of the grant does not affect the charitable trust which must be held to attach to the land.

Church Street Ghaut therefore having been, according to this view, granted to the inhabitants of George Town for charitable purposes, had the trustees or whoever were in possession of the land power to dedicate it to the public as a highway?

It appears from the history of the Municipality that by the desire of the Government the people of the town elected a certain member of representatives called the Committee of Assessors to whom was entrusted the case of the town in all matters concerning the drainage, the making and repairing of streets and all similar matters. The Committee of Assessors was also authorized to assess the inhabitants for public purposes, and it exercised a general control over the town and amongst its other charges it seems to have had charge of the ghauts. Indeed it was on the application of this Committee that the Government granted out the ghauts and the other lots in the town. This body was not incorporated and was therefore incapable of taking by grant. It was originally a purely voluntary body, at least I have not seen any law or regulation recognizing its existence. I believe there was a regulation of the Government in Council on the subject in 1827, but I have not had an opportunity of seeing it. Then came Act XII of 1839 which authorized the Chief Civil Officer of the Settlement to make assessments to a certain amount and to appoint officers to collect such assessments. And the next important Act on the subject was Act IX of 1840 which also provided for the assessment of the town and for the watching, repairing and lighting the roads, streets, &c. This Act also directed the Civil Authority of the Settlement to anpoint a Municipal Committee to make order for the performance of the Act and empowered it to make rules and regulations. Committee was not incorporated and no property was vested in it. Then came Act XIX of 1856 which vested in the Municipal Commissioners all property, however, acquired by the Commissioners &c., and then vested in them or any other persons in trust for them to be held by them as Trustees for the purpose of the Act. But it was not until Act XXVII of 1856 that the Municipal Commissioners were constituted into a corporation with perpetual succession and a right to sue and be sued. It is clear that they would not previously to their incorporation have acquired their right to property, except in their individual capacity. It is probable therefore that the legal estate in the ghauts remained in the E. I. Company. the grantors, down to 1856, subject, of course to the trust which they had themselves created. The Committee of Assessors or Municipal Committee or by whatever names these different bodies may be designated may be regarded as the agents, acting for and on behalf of the trustees of the charity. Assuming then, that they were to all intents and purposes as far as the ghauts were concerned. the agents of the trustees, had they or their principals power to dedicate the ghauts to the public as highways. Mr. Bond urges

that they had and cites the Rugby Charity case, 11 East 375. But that case is very shortly reported in a note, and the facts do not appear, and I may remark, that Parke J. observed in Rex v. Leith 5 B. and Ad. 469, that "the Trustees in the Rugby case were only trustees as to profits and that they acted as ordinary owners." Mr. Bon I also referred to Surrey Canal Co. vs. Hall, 1 M. and G. 392. But that was a dedication by a Canal Company which stands in a different footing from trustees for public purposes as they are masters of their own property. As was said in that case, though they may be answerable to the rest of the proprietors for failure of duty, there is no reason why the public may not by use gain a right, as against them, as well as against any other individuals. Mr. Bond then urged, that although the ghants were granted to the town for the express purpose of establishing a revenue, yet that as the mode of raising the revenue was not pointed out, it did not necessarily follow that the revenue was to be raised directly from the ghants themselves. And that it might well be, that it was contemplated that the user of the ghauts as highways, would enhance the value of the adjacent property, and by increasing its rateable value would thus indirectly enlarge the revenue. But although this construction is ingenious, I confess I am unable to read the grants in this way. It appears to me that the words, "for the express purpose of establising a revenue," means that the revenue was to be raised out of the ground itself and not indirectly out of some other piece of ground whose value might possibly be increased by using the ghants as a highway. I think in construing the meaning of the words "establishing a revenue" we should regard the ghants as the proximate and not the remote cause of the revenue to be raised, and it appears to me clear from the words of the grant, that the intention was that the ghauts should be made use of for the express purpose of raising a revenue in aid of the town. How that revenue was to be raised was not stated. That was left to the discretion of the town people themselves, and as has been seen in the earlier days of the history of the town, a revenue was raised from the markets and shops which were established in some of the ghauts. Not indeed in Church Street Ghaut, but although this ghaut was not made use of for any purposes of profit, I think the original trust still clings to it, and that the Committee of Assessors or the Municipal Committee or whoever were the persons acting as or on behalf of the trustees were bound by the original trust. The duties of trustees for public purposes and their right to dedicate property entrusted to them, to the public as a highway was discussed in the case of the King vs. Leare, 5 B. and Ad. 469. In that case the

Commissioners for drainage being authorized by an Act to make drains and dispose of the earth in forming banks on the sides thereof, made a drain and with the earth taken from it made a bank on one side of it which had been used for twenty five years as a public highway, it not appearing that the cleaning of the drains or any other purpose of the Act, had been or was likely to be interfered with by any such user of the soil, it was held that a dedication might be made by the Commissioners upon the case, it is necessary to be observed that the question decided was mainly one of fact, the law on the subject being clearly laid down by Parke J. as follows: "If the land were vested by the Act of Parliament in Commissioners so that they were thereby bound to use it for some special purpose. incompatible with its public use as a highway I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects pre-cribed by the Act, then I think it clear, that the Commissioners have that power." But the learned Judge after carefully considering the duties imposed on the Commissioners by the Act of Parliament came to the conclusion that there was nothing inconsistent with those duties in the dedication of the land to the public as a highway. Mr. Justice Littledale however differed in opinion with the rest of the Court, and his remarks are worth citing. He said, "certain powers are given to the Commissioners to deal with the land mentioned in the Act in the manner there prescribed and under their power they have made a bank which is subservient to the purposes of the drainage. part of this bank the road in question extends. It is true that the bank has not, for a great number of years, been pratically used to give any further protection or support of the works than it did when first made, and probably it never may be wanted in any other state than that in which it now is. But I cannot take judicial notice of that, and I cannot say but at some future time it may be wanted for the works of the drainage, in such a manner as that it could not be used beneficially for those purposes if there was a common highway over it. And I think the Commissioners had no power to dedicate to the use of the public as a highway, land which they were entrusted with the ownership of, for a special purpose, and for which special purpose this land may at some future period be required."

Now applying the principles laid down in R. vs. Leake and the present case, it seems to me that the dedication of Church Street Ghaut to the public as a highway, would be altogether inconsistent with the purposes for which the ghaut was granted. It was

probably contemplated that the ghaut would be made; use of by the public in the manner in which it has namely, as a means of access to and from the sea. But it was evidently the intention of the Government that it should also be means of raising a revenue for the benefit of the town, whether by tolls or by rents it is not material to inquire, but it was granted for the express purposes of revenue. If the ghauts were once dedicated as a highway, there was an end to any revenue to be derived from it in any way. There could be no tolls, no sheds or buildings, no obstruction of any sort, and therefore no means whatever of raising a revenue. It has been held, indeed, that a highway may be dedicated with obstructions or impediments which if made in an existing highway would be a nuisance. (See, Le Neve vs. Vestry of Mile End. 8 E. & B. 1054. & Morant v. Chamberlain, C. H. & N. 541). But the elefendant must here prove a dedication of the whole close as a highway or he has failed to make out his case. (a). The issue raised is highway or no highway, and ordinarily speaking where a road runs between fences, the whole space between the fences is considered as highway, (R. v. Wright 3 B. & Ad. 681) and any contracting or narrowing of the road is a nuisance. For instance supposing the dedication in the present case to be established the Commissioners if they erected sheds or suffered goods to remain for any length of time on the ghaut, would be guilty of causing a nuisance. In fact any effort to utilize the ghaut for purposes of profit would be illegal once it was established as a highway.

Mr. Bond has further urged that the Act. XIV. of 1856, which vested the property in the Municipal Commissioners has put an end to the trust created by the Grant of 1802. The 4th Section of that Act is as follows: "All property moveable and immoveable purchased or otherwise acquired before the passing of this Act by the Commissioners or other persons however designated heretofore lawfully administering the funds applicable to the Conservancy and Improvement of the said Towns &c., and now vested in them or any other persons in trust for them for any such purnoses, shall after the passing of this Act be vested in the Municipal Commissioners for the said Towns &c, as trustees for the purposes of this Act." The purposes of the Act are in the preamble, stated to be, to make better provision for the Conservancy and Improvement of \* \* \* \* the several Stations of the Settlement of P. W. Island, Singapore and Malaca, and to invest the Municipal Commissioners for each of the said Towns and Stations with the powers hereinafter mentioned. Then in Section VI, it is

<sup>(</sup>a). See Knight Lillo, 2 Wils. 81.

said that the Commissioners with the con-ent of the Local Government may lay out and make new streets and roads &c. I presume the argument on this point is, that the Commissioners under the powers of the Act have dedicated this gleaut and made it into a But it appears to me that the evidence of what occurred subsequently to 1856 is opposed to any presumption of dedication. It is in evidence that for some time previous to 1856 the Municipal body had contemplated letting out the various ghauts, and we find that in 1859, less than three years after the Municipal Commissioner came into existence (the Act XXVII of 1856 was not passed until 20th December 1857) Church Street Ghaut was rented out, a fact which conclusively rebuts any presumption of its dedication as a highway. I think therefore even admitting that the Act of 1856 empowered the Commissioners to dedicate Church Street Ghaut to the public as a highway that there is no satisfactory evidence of such dedication.

It is also said by Mr. Bond that only a portion of Church Street Ghaut is included in the Grant of 1802 and that the new portion is not subject to the trusts of the grant and therefore may, be the subject of a dedication as a highway. But it seems to me that even agreeing that one portion of the ghaut is not subject to the trusts of the grant still this does not help the Defendant in-asmuch as he is bound to show that the whole ghaut is a highway, apart from the difficulty of holding that the trustees, whoever they were, intended to dedicate one portion and not to dedicate the other, the evidence of user being precisely the same with regard to both the old and new portion of the ghaut.

On the whole case, I am of opinion, that previous to 1856 the Municipal Committee had no power to dedicate the Church Street Ghaut as a public highway, in-as-much as such dedication would have been altogether inconsistent with the purposes for which the ghaut was granted. Any dedication of the ghaut as a highway in the full sense of the word, would have put an end for ever to any revenue to be derived from it.

And as to what has occurred since 1856, I think the whole evidence rebuts the idea of any dedication being intended. The account given by the witnesses of the state of Church Street Ghaut in modern times of the bad state in which it was kept, of the constant obstructions in the shape of piles, of bricks, timber, firewood and other articles, all this seems to me to negative the idea that the Municipal Commissioners intended to dedicate the ghaut to the public as a highway.

But in deciding this, I wish to guard against being understood

to decide anything more, whether the public may not have acquired a right of passage over the ghant, subject to certain restrictions is a question into which it is unnecessary to enter, as it is not in issue. All I intend to decide is that I do not consider that Church Street Ghaut has been dedicated to the public as an ordinary highway.

I now come to the Fifth plea, (the fourth plea having been held had in demurrer) in which the defendant relies upon a private right of way on foot and with horses and other cattle and with carriages from the highroad over the Church Street Ghaut to the premises occupied by Messrs. Lorrain Gillespie and Co. and vice versa.

The evidence in the case showed, that for a long time, certainly eyer since the year 1810 and probably previously to that date, there was a gate in the premises now occupied by Messrs. Lorrain Gillespie and Co. opening in the Church Street Ghaut and that this gate has been used ever since by the occupants of these premises as an ordinary access to them for all purposes. The user, therefore, has been for a sufficiently long period of time to support the presumption of a grant of private right of way. But Mr. Rodyk has contended, that the whole evidence tends to shew that there was only a permissive user of this right of way and that you are not to make the same presumption in the case of trustees for public purposes as you would in the case of private individuals. He also cited the Altorney General vs. Magdalen College, 2 House of Lords Ca, 189, to shew that it was only in the case of the property being parted with for a valuable consideration that the rights of those entitled to trust property would be barred by the Statute of Limitations.

Now with regard to the point that the user was only permissive I can find no evidence in the case to support that view. The user has the ordinary use of a gate for every purpose for which it was required and no permission was asked or granted.

But Mr. Rodyk relies on the circumstance that for a very long period the premises now occupied by Messrs. Lorrain, Gillespie and Co. were occupied by the officers of the Municipality and that under those circumstances the same inference cannot be made as if the premises had been occupied by strangers and that it might well be, that the Municipal Committee permitted this use of the gate in question without intending thereby to confer any right of way. But with reference to this argument, I think, it is sufficient to observe that it is in evidence that on the opposite side of the ghaut to Lorrain Gillespie and Co's premises, in the pre-

mises occupied by Mr. Nairne, there is a gate which has been in existence for a great many years, and as to which there never has been any question as to the right of way. This fact seems to me to rebut the inference which Mr. Rodyk wishes to draw as a matter of fact, namely, that it was only the accident of the Committee having their offices in Church Street Ghant which caused the gate opening on the ghant to be tolerated. Whereas in fact, we have it clearly established that a similar gate with a like right of way existed in the opposite premises which were in the possession of persons unconnected with the Municipal body.

As to the argument, that presumption against trustees for publicpurposes is not clearly made, and the effect of the Statute of Limitations as concerns trust property, I will deal with them both together. And first, I think it necessary to point out what strikes me as a fallacy in Mr. Rodyk's reasoning. He has argued this part of the case by analogy to cases in which the trust property has been allenated by the trustees and the question has arisen as to whether the entire cestui que trusts should be bound by the alienation. question here is whether it was altogether inconsistent with the purposes of the trusts that a right of way should be granted over the trust property. This latter question seems to me to differ some-The analogous case to those cited by Mr. what from the other. Rodyk would be if the Commissioners had sold or leased Church Street Ghau', in fact had altogether deprived the Town of the use of it and the people of the town disputed their right to it. The present question seems to me to resemble somewhat that which arose in Rex. v: Leake, whether it was consistent with the purposes of the trusts that a right of way should be granted.

To return once more to the early history of the town we find that the ghants were placed opposite the principal streets intersecting Beach Street, and I think there can be no reasonable doubt that one of the objects of their institution was to afford the inhabitants of George Town easy access to the sca. They were to all intents and purposes public ghants, i. e., public landing places. No doubt they were stated in the Grants to be granted for the express purpose of establishing a revenue and their user must I think have been restricted in accordance with the terms of the grant but when we look the manner in which they were formed, their early history, their mode of using their position with regard to the town and their name, it is impossible to avoid the conclusion that although intended to aid the revenue, they were also meant for the general convenience of the people of the town. Now this being so, was there anything in the nature of the trust to prevent the

trustees from granting the owners of conterminous property reasonable access to the ghaut? Is the ghaut to be viewed in the same way as enclosed premises, which might be seriously damaged by the allowance of such an easement? Would it be a breach of the trust to permit such an encroachment on their right? I think not, I think it was quite within the scope of the discretion of the trustees or the persons managing the property to permit the owners of the adjoining lots reasonable access to the ghaut and that there would be nothing inconsistent with the trust in such a user of the ghaut, and we find that, in fact, in most of the ghauts, such gates have existed as far back as the time of living memory.

For this reason I think, that it was quite consistent with the original purpose for which the ghaut was established, to grant a right of way over the ghaut and with regard to the upper gate the defendant has made out his plea.

But the Plaintiffs in the petition allege two trespasses, the breaking down of two boardings, one of these was at the upper gate of which I have been speaking, and the other was at a gate much lower down in the ghaut.

This gate stands in a different position from the other. It has only recently been opened—and it stands in a part of the property which was not in existence at the original grants, having since been reclaimed and filled in. Strictly speaking, therefore, the plea alleging a grant previous to 1802, could not be supported by a proof of right of way over property, which did not come into existence until many years after the alleged grant. But apart from this legal difficulty, I do not find that the evidence in support of this second right of way is sufficiently clear and distinct. There is no doubt that the gate has only been made recently and not sufficiently long ago to confer a right, but then it is said that before the wall was made in that part of the ghaut, we were in the habit of passing and repassing over the ground in question, and thus acquired a right of way. If user of this sort were shown for a sufficient length of time, no doubt it would establish a right of way, but there is no evidence as to the length of time that this use was made of the lower portion of the ghaut, and I am therefore of opinion that the Defendant has not succeeded in supporting his plea as regards the lower gate.

On the whole case, there must be judgment for the Plaintiffs.

May 1872.

Before His Honor Sir Wm. Hackett, Kt, Judge of Penang. Reg. vs. Lim AH Weng.

The Crown cannot call the wife of the prisoner as a witness against him, although he consents to it

A woman who is simply a mistress of the prisoner can be called as a witness against him, without any consent on his part.

The prisoner was indicted for nurder. That he committed the murder was clearly proved, in fact it was admitted by the defence, who in answer to the charge, set up the insanity of the prisoner as a defence. During the course of the trial, Mr. Logan, the Solicitor General, on behalf of the Crown called the prisoner's wife, as a witness against the prisoner, the Judge told him he could not do so.

Mr. Woods for the defence then said, he consented to the woman being examined, as he was instructed her evidence would be in his favour.

THE JUDGE.—The Act (a) expressly prohibits husbands and wives being witnesses against each other in Criminal cases, so the Court cannot act beyond its jurisdiction, even by consent of all parties. (b).

It afterwards, appeared that the woman was not the wife of the prisoner but simply his mistress, she was therefore allowed to be called and examined as a witness against the prisoner.

The Jurors about an hour after brought in a verdict of "Guilty."

(a.) Act 2 of 1855, also see Ordinance 22 of 1870. S. 28. (b.) See Fletcher vs. Moore, 18 L. J. Ch. (N. S.) 384.

2nd July 1872.

BBFORE SIR W. HACKETT, Judge of Penang.

ONG PAK ONG, Appellant vs. TAN Boon Teng, Respondent. If the case stated by a Magistrate under Act 27 of 1867 is not transmitted to the Court within six days after the appellant has received the same according to the Act, the case is dead, and must be struck off, and it cannot be revived.

This was an appeal under Act 27 of 1867 (a) from the decision of the Penang Police Magistrate. The case sent to the Appellant by the Magistrate was not transmitted to the Court until 10 days

after receipt of same.

After which it was remitted by the Court to the Magistrate to be amended.

Mr. Logan appeared for the Respondent and made a preliminary objection that the Act was not complied with as the case was not

<sup>(</sup>a.) Now Ordinance IX of 1874.

transmitted to the Court within six days from receipt of same, and it could not now be revived after once being dead, and cited Taylor on Appeals 48—51; Woodhouse vs. Woods, 29 L. J. M. C. 149; Morgan vs. Edwards, 5 H. & N. 413 and 29 L. J. M. C. 108; Pendall vs. Church Wardens of Uxbridge 31 L. J. M. C. 92; Gloucester Local Board of Trade vs. Chandler, 32 L. J. M. C. 66; Banks vs. Goodwin, 3 B. & S 548.

Mr. Bond for the Appellant contended, that in this case, the case stated being so bad, there was no case at all, and consequently it could not be dead, and this was a new case; that the Court would not observe the English rule, as by Sec. 14 of the Act, the amendment was only matter of form, and the Court had the power to amend, and if the case be dead to revive it.

Cur. Adv. Vult.

On the 3rd of July — The Court held, that the case was dead as it was not trans mitted in time, and that it could not be revived and must be struck off from the list.

Struck Off. (a)

(a) See Peacock vs. Reg., 27 LJ. CP. (N. S.) 224, Rowberry vs. Moorgan, 23 LJ. EX. (N. S.) 191 and 9 Ex. 730; Hinton vs. Stevens, 4 Dowl, 283; Wardle vs. Ackland, 2 Ibid. 28.

#### \_\_\_\_\_

#### 2nd July 1872.

BEFORE SIR WM. HACKETT, KNT. Judge of Penang.

Law Seow Huck vs. The Spirit Farmer of Penang.

It is not absolutely necessary for the Spirit Farmer before suing under Section 37 of Ordinance IV of 1870, (the Excise Ordinance) to enter into the place of the Defendant where the Spirituous Liquors are stored, and to inspect the same; but he may sue under such Section, on the accounts rendered him by the Defendant as the words "on search duly authorized," in such Section. mean the inquiry or demand given him by the preceding Section.

This was an appeal from the decision of the Penang Police Magistrate.

Mr. Woods for the Appellant.—The Respondent originally prosecuted Messrs. Seew Huck and Co. in the Penang Police Court, but such prosecution was quashed, as no prosecution can be taken against a Company and the whole thing was a nullity. Shortly after, a second summons was issued by him against the Appellant alone, in which he was charged with unlawfully having on the 6th day of April 1871, insufficient quantities of brandy &c. At the trial the Appellant pleaded "not guilty" and was fined \$50 besides being ordered to pay to the Farmer the duty on such deficiency which amounted to \$18. The depositions sent up shew the prosecution to have been under either the Act of 1869 or 1870-

Now the latter Act was not in force then. The Straits Government Gazette Extraordinary of 12th July 1870, declares the Act was to come into operation from the 15th July. The Excise Acts of 1868 and 1869 were repealed by the Act of 1870. They would proceed I presume under the 37th Section of the Act of 1870. The 36th Section is as follows: "It shall be lawful for the Soirit Farmer at each of the Settlements, at the coming into operation of this Ordinance, to demand from every person having possession, custody or control of Spirituous Liquors at the Settlement, or from the agent of such person, an account in writing of the quantity and description of Spirituous Liquors so held, distinguishing the Spirituous Liquors on which duty has been paid . to the said Farmer or the preceding Spirit Farmer from those on which duty has not been paid, and every Spirit Farmer, shall be at liberty at any time during the term of his exclusive privileges, but not oftener than five times in each month, in like manner to demand a similar account. and to enter the premises in which such Spirituous Liquors are stored, and to inspect the same, provided that such demand and entry, is made on any lawful day between the hours of 6 A. M. and 6 P. M., and every person refusing to give such account. or without reasonable cause shewn to furnish such entry, or giving a false or incorrect account, shall be liable on conviction, to a penalty not exceeding Two hundred Dollars;" and the 37th states; "If it shall appear on such inspection, or otherwise, on search duly authorized, there is any deficiency in the quantities of Spirituous Liquors which ought to be found stored in any place, according to the landing permits of the Registrar of Imports and Exports. and the permits granted for exportation, or for the removal of Spirituous Liquors, the person or persons in whose name the landing permit was issued by the Import and Export Officer, in the case of Spirituous Liquors found defective in quantity at the place where stored on landing, or the person in whose premises the deficiency may be detected, in the case of Spirituous Liquors removed from a Licensed Distillery, or from a store, shop or place, may be summoned before a Magistrate of Police and on proof to his satisfaction that there is a deficiency in the quantity of Spirituous Liquors, such person shall be liable to a penalty not exceeding Three hundred Dollars and shall pay to the said Spirit Farmer the duty liable under the provisions of this Ordinance on the deficiency." It then provides for cases of leakage or breakage. The Farmer under the 36th Section had a right to demand an account, and a correct account was given, the deficiency alleged by the Farmer is an error in his

own account. If the account was not correct then they must have him up under the 36th Section. The word "inspection" is used in the 37th Section, and this word, it is submitted, must mean an actual inspection at the shop, and not simply by the accounts rendered to the Farmer. This construction is helped by the 36th Section which uses the words "to enter into the premises in which such Spirituous Liquors are stored and to inspect the same." I submit the accounts demanded and rendered were insufficient. It is impossible to say that "inspection" means any thing else than that the Farmer must go to the premises and inspect. By the Farmer's own accounts, the permits for removal and exportation are mixed up. They are entirely different things.

THE JUDGE. - What Section was the conviction under?

Mr. Woods .- Section 37.

THE JUDGE.-What's the meaning of "or otherwise."

Mr. Woods —I submit it means "search duly authorized." by the 36th Section.

THE JUDGE.- Was there any search in this case?

Mr. Woods.—No, they proceeded simply on the accounts rendered by the Appellant. This is a dreadful Ordinance. The dealer is tied down both ways. The permit should never be returned, if so, the Section is done away with. I submit there is no evidence of a deficiency. The 37th Section includes two offences; 1st. a deficiency according to permits of Imports and Exports of liquors; and 2nd, permits for the removal of liquor. They have jumbled the two together in this case.

The Jungs.—It is hard to draw the line between the two offences. I understand the charge to be this, you ought to tave so much liquor according to the permits.

Mr. Woods.—Theoretically it is so, but nothing is said about the removal in the charge. 2ndly.—There is no evidence of the guilty knowledge of the Appellant of deficiency, which is necessary in a criminal charge. Inspection must refer to previous Section on which it is supported. There is a total absence of this act of the Farmer.

THE JUDGE. - Did the Appellant explain the deficiency?

Mr. Woods .- No, the Farmer has to shew it by the permits.

The Judge.—No, the Farmer has not the permits. Why has not the Appellant shewn evidence? Why did not he defend the case?

Mr. Woods.—I submit the defence was unnecessary, the Magistrate had no right to convict on such evidence as this, under this Section.

THE JUDGE.—You rely then on no search being made, you did not shew that he did not search, why was there no defence if you relied on this?

Mr. Woods.—The Section is strong and as it was not followed it was unnecessary to go into the defence.

THE JUDGE.—It appears to me that the Defendant was convicted by his own mouth. He now says that is insufficient. The only question here turns on the Act.

Mr. Logan for the Respondent.—The only objection taken before the Magistrate and which is the only question here, is on the Act. and I submit it is not competent to the App llant to raise any other objections than those made before the Magistrate. on Appeals-63. As to the word "inspection," I submit the contention of the other side is untenable. In Paul vs. Knox, 4 B. & S. 515., the same objection was raised as here. No judgment was given, but the case was sent back to the justices. The presumption therefore is that actual search is unnecessary. I submit that the remarks of Justice Blackman in that case is exactly in point. It clearly shews an actual search is unnecessary. If the argument of the opposite side was to hold good, the highest evidence, (a) namely, the Appellant's own confession would If the Farmer saw a man earry 1 not be sufficient. dozen bottles of brandy out of Seow Huck's godown which he knew of his-own knowledge was being taken away without a permit, surely his own eye-sight is sufficient, and it is not necessary for him to go into the stores and in pect the whole stock of liquor to find whether there is any deficiency. He is bound by the 36th Section to render accounts when demanded, and that is sufficient to show the deficiency; especially here where we have his own confession which is strong evidence.

THE JUDGE.—It is only necessary under this Section for the Magistrate to be satisfied there is a deficiency. The words in this Section no doubt are ambiguous.

Mr. Logan.—An inspection is only necessary when he can get no other proof. If the man in the instance given, were to replace the goods before the Farmer could inspect, the Act would then assist him, instead of punishing him. As to the guilty knowledge the evidence of the last witness shews the Defendant had knowledge of the deficiency.

Mr. Woods in reply .- If any search was made it was before

<sup>(</sup>a.) See Stlaterie vs. Pooleý, 6 M. & W. 664; Newhall vs. Holt, Ibid 662; the cases to the contrary must be considered as overruled.

the Act came into operation.

THE JUDGE.—You should have shewn that in evidence, you have altogether relied on the words in the Act.

Mr. Woods.—The conviction is also bad, as the Appellant was not only fined, but was ordered to pay the Farmer the duty on such alleged deficiency. The fine itself was sufficient under the 37th Section. And as to the guilty knowledge, the Magistrate himself says the Appellant had no knowledge of the offence.

Cur. Adv. Vult.

On the 8th of July JUDGMENT was delivered.

This is an appeal from the Magistrate's decision. The question arises on the 37th Section of the Excise Act IV of 1870, which is supported by the preceding Section, (reads the Section,) Now this authorizes the Farmer to do two things; 1st-To demand an account of Spirituous Liquors; and 2ndly-If not satisfied with the accounts, for himself to go and inspect. These are two distinct things. If he is satisfied with the accounts, he need not inspect, otherwise he can. It either of these is refused, the party refusing is liable to a penalty. It is clear from the preceding Section, how the 37th Section is to be construed. The evidence to be given under this Section may be according to the 36th Section, "or otherwise," which are general words, and include any sort of evidence; but I think the 36th Section is quite clear on the point. The 37th Section is not free from doubt, the words shew it was not carefully drawn, and having regard to the 36th Section, it seems the writer was not happy in the mode of expressing himself. Taking the whole context, I think the Farmer intended that the Magistrate should convict, if the evidence was sufficient to shew a deficiency. The words "search" and "inspection," have not the same meaning. If "search" meant "inspection," why use the word "inspection." The word "search" than I take to mean "inquiry," and the letters and notices of the Farmer, was an "inquiry," and was a sufficient "search." and as the Farmer was satisfied that the accounts corresponded with the quantity of figuor in store, he was not bound to inspect. If the contention of the Appellant is correct, it would shut out the strongest evidence against him,

= CXCX2E

Conviction affirmed.

#### 2nd July 1872.

BEFORE SIR WM. HACKETT, KNT., Judge of Penang.

Ong How & others, Appellants vs. Abdulrahman, Respondent.

The word "produced" immediately after the statement of a witness that he received a written information, in a case stated by a Magistrate under Act 27 of 1867 is not of itself sufficient evidence that the information was produced.

QUERY.—If there was evidence that the information was produced, whether it would vitiate the whole proceed in sabeing contrary to Act 13 of 1870.

Where the defence of the prisoners was an alibi and the Magistrate admitted evidence in reply which not only contradicted the defence but corroborated the evidence for the prosecution—HELD, that it was left to the Magistrate's discretion whether the evidence could be admitted or not, and as he had admitted it, it was no ground for an appeal. Where the witness in reply was called after the prosecution was closed, but during the time the defence was going on. HELD, that this gave the less objection to the evidence being admitted.

This was an appeal from the decision of the Province Police

Magistrate.

Mr. Ross for the Appellants. - This is an appeal from the decision of the Province Police Magistrate, in a case for keeping a common gambling house. A Summons was issued against the Appellants but was dimissed as the number of the house was wrongly stated. A new Sammons was issued which only charged the Appellants with keeping a common gambling house. The case stated by he Magistrate has placed one of the witnesses Pungula Sam Guan, at the end of the case for the prosecution; whereas he was really examined during the defence, and the deposition book of the Magistrate has it'so. I submit the evidence in this case does not bear our the conviction. They were only charged with keeping a gambling house. Both the informers say all the Defendants were acting as "Poh Kwangs," and of course if such was the case, all were equally guity, yet the Magistrate discharged two, and fined three, which are the present Appellants. The whole evidence simply shows the Defendants were there for the purpose of gambling, but not for keeping a gambling house.

THE JUDGE.—Is there not sufficient evidence to support the

conviction?

Mr. Ross.—No, they were charged with one offence, namely, keeping a gambling house, and fined for another, namely, for gambling.

THE JUDGE.—The depositions no doubt are not satisfactory but

I thing the evidence is sufficient.

Mr. Ross.—The Gambling Act 13 of 1870 (a) makes these two seperate offences, the fine on conviction for keeping a gambling house is not exceeding \$3000, whereas for being there for the

<sup>(</sup>a.) Now Ordinance 9 of 1876.

purpose of gambling, the fine on conviction is not exceeding \$50 only. The custom in the Police Courts here has always been to charge the Defendant with both offences, so that if he is acquitted on one, he might be convicted on the other, but this was omitted here. There is not the least evidence that they kept the gambling house.

THE JCDGE -I think the evidence is sufficient.

Mr. Ross.—Secondly, the information was produced at the trial. This is expressly prohibited by the Act. It might be said that it was to their advantage that it was produced, but I submit, that it was to their disadvantage, as they had not seen it, and did not know the contents of it.

THE JUDGE.—There is no evidence that it was produced.

Mr. Ross.—The word "produced" is written immediately after the statement of a witness, that he received the information. That is sufficient; it must have been shown to the Magistrate and may have had some weight on him. It is the daily practice of the Courts here to write the word "produced" when a paper is produced.

THE JUDGE. - No, that is insufficient.

Mr. Ross—Thirdly, the evidence of Pungulu Sam Guan ought not to have been admitted, it was evidence in reply, but although it contradicted the defence, it corroborated the evidence for the prosecution, and therefore ought not to have been admitted. The rule in such case is, that the evidence can only be admitted when it simply contradicts the defence, Rex vs. Stipson, 2 C. & P. 415. I have a still stronger case, and it is on all fours with the present, and that is the case of Rex vs. Hilditch and others, 5. C. & P. 299.

THE JUDGE.—The depositions are all regular.

Mr. Ross.—Yes, but the original are not so.

THE JUDGE.-Yes, but I must look to the record sent up.

Mr. Ross.—Fourthly, the Defendant's witnesses were present in Court, but were not called.

The Judge.—That is a dangerous ground to go on. Supposing Pungulu Sam Guan's evidence is struck out, will not the other evidence support the conviction?

Mr. Ross.—I submit that this evidence having been admitted, it vitiates the whole proceedings.

The Judge.—The latter case cited was only a nisi prius case. A subsequent case decided by B. Alderson contradicts the authorities cited.

Mr. Ross.—Yes, but in that case the case of Rex vs. Hilditch was not cited.

THE JUDGE .- No.

No one appeared for the Respondent.

Cur. Adv. Vult

On the 3rd of July JUDGMENT was delivered.

This is an appeal from the decision of the Province Police Magistrate. The only question is as to the effect of Pungulu Sam Guan's evidence on the whole proceedings. It was contended, that as his evidence, which was admitted after the case for the prosecution was closed, corroborated the evidence for the prosecution it was inadmissible, and having been admitted it vitiated the whole proceedings, and the cases of Rex vs. Stipson & Rex vs. Hilditch were cited. These cases seem to be contradicted by a subsequent case decided by B. ron Alderson, Rex vs. Briggs. 2 M. & Rob. It was said that Rex vs. Hilditch was not cited in this case; assuming such was the case, I think, it would have no effect. sides this, there is the case of Briggs vs. Anysworth, 2 M. & Rob. 168, decided by C. J. Denman, where the evidence was held admissible. However all this may be, all the cases clearly shew that it must be left in the discretion of the presiding judge. It has \*often happened in my time that after cases for both sides were closed, the Plaintiff was allowed to give further evidence in reply; but here it was after the case for the prosecution was closed, but while the defence was going on, this I think gave the less objection to the evidence being admitted. The conviction must be affirmed.

Conviction Affirmed.

## 18th September 1872.

BEFORE SIR W. HACKETT, Judge of Penang.

Tan Toh Lee, Appellant vs. Hat, Respondent.

Although the Gambling Act 13th of 1870 is very strict, still there cannot be a conviction under it for keeping a gaming house, unless proof of guilty knowledge is given. Where the Mugistrate convicted the Appellant on such a charge without proof of such knowledge, and the Appellant appealed, the Court refused to quash the conviction, but sent the case back to the Magistrate for such proof.

This was an appeal from the decision of the Province Police Magistrate.

Mr. Bond for the Appellant.—This is an appeal on the ground that there was not sufficient evidence for a conviction, and consequently the Magistrate had no jurisdiction. The Appellant was charged with keeping a house for the purpose of gambling, but the evidence has not in the least shewn this. Not the least inference can be drawn from the evidence even of the Appellant being there. He admits the house is his, but says it was, and still is, in the occupation of another his tenant; and he altogether

denies all knowledge of the way, or for what purpose, the house was used.

THE JUDGE -If it is his house, would be be ignorant of it?

Mr. Bond -Although the Act is strict, yet I submit proof of guilty knowledge is necessary for a conviction.

THE JUDGE. - Of course, there can be no conviction without such

knowledge.

Mr. Bond.—But there is no evidence of knowledge in this case. and the Appellant ought not to have been convicted.

THE JUDGE - Gambling is continually going on in the house which is a well known fact. It is ab-urd to say he had no

knowledge.

Mr. Bond .- If so, why did not the Policelong ago stop it? It was simply because no such play was carried on there. The case ought not to have been brought on this evidence. I submit, as this is a strict Act, it must be construed strictly.

THE JUDGE -I think the only course is to send the case back to the Magistrate for proof of Appellant's guilty knowledge, he being allowed to produce evidence.

Case remitted to the Magistrate (a)

#### CEO 19th September 1872.

BEFORE SIR WM. HACKETT, KNT., Judge of Penang. ONG CHENG NEO vs. YEAP CHENG NEO and other Executors and Legatees under the Will of OH YEO NEO. deceased.

A Testatrix directed that in the event of L. A. Y. not wishing to reside in a certain house named by her, he was to be allowed to occupy another named. house free of rent for a period of forty years from the day of the testatrix's. death, and after that the property was to be given to him and his heirs.—HELD, that the first part amounted simply to a licence to him to live in the house and that the gift of the fee was not a remainder but an executory devise and as such was void on the ground of remoteness and as violating the law against perpetuities.

This was a question which the Judge had asked counsel to be re-argued when delivering his Judgment on the other parts of the Will.

(See page 314.)

Mr. Bond appeared for the Plaintiff.

Mr. Logan (Solicitor General) for the Defendants.

THE JUDGE.—The question in this case which has yet to be decided arises on the 7th clause of the Will which is as follows (reads it.) I have great doubt in construing this clause on ac-

<sup>(</sup>a.) Queen vs. Sleep, 30 L. J. (N. S.) M. C. 170 and 8 Cox's C. C. 41. Russell on Crimes, p. 593-Reg. vs. Dickenson, 3 M. & S .- Hearn vs. Harton, 28 L. J. M. C. 216.—Reg. vs. Weeks, 20 L. J. M. C. 141.

count of the ignorance of the person who drew the Will, in the law and therefore not able exactly to express what the testatrix wanted. The question, I think, must be decided by general principles. The first thing is to find what was her intention. She evidently wanted the house to be a family house and as Lim Ah Yong was one of the family, she allowed him to stop there for forty years. The question here is, is it a gift or a licence which the trustee is ordered to give to Lim Ah Yong. The words "use and occupy" has been held by Lord Eldon to give or transfer the whole property, but here on looking at the whole clause, I don't think the testatrix meant to give more than a mere licence to rent the house to Lim Ah Yong, until 40 years were over, and that the house was not to be sold or transfered to him till then.

Forty years seems to be a favourite of the testatrix; throughout the whole Will she uses the mystical term or number of forty years. The trustees were to keep the property in their hands, but to allow Lim Ah Yong as a matter of favour to live there. Their come the words that the property was given to him in fee without power of alienation. Mr. Bond contends, that this gift in fee is void, on the ground of remoteness as being given after 40 years, as the time limited by law was for lives in being and 21 years thereafter, or if the time is fixed, must not be more than 21 years. Mr. Logan contends, that this gift is a remainder and can take effect. It testatrix had said, she gave the house to Lim Ah Yong for forty years, and after that in fee, it would have been good, as it vested in him at once. According to law if an estate is given in future, it cannot be construed as a remainder; even if one day was wanted, it would not be a remainder but an executory devise. In Fearne's Contingent Remainders, in the introduction curiously enough even, that learned and clever author made a blumder. As long as there is any suspense, it is not vested. Mr. Butler, in his notes to Fearne, remarks this blunder. The question is, had the devisee the estate, if he had, it was good as he had power to alienate. But here it was a licence, and not a vested estate in Lim Ah Youg, to get the estate he must wait till 40 years after testator's death; the lands therefore would be tied up for 40 years and the gift is therefore void as violating the law against perpetuities. There is no case on all fours with this, but Fearne at page 401 seems to think such a gift would be void. This applies to the eighth clause also, and the property comprised in those two clauses therefore fall into the undisposed of residue and the costs of all parties will come out of the estate. (a.)

<sup>(.)</sup> See Scott vs. Key 35 Beav. 291 and Lochlan vs. Reynolds 9 Hare 796.

19th September, 1872.

Before His Honor SIR WM. HACKETT, Kut., Judge of Penang. MAMOMED JOONOOS v. SATBOO.

Ejectment.—Plea of former Judgment -Adverse Possession.

An action of trespass to land is an estoppel to an action of ejectment for the same land provided the title to the freehold was put in issue and there has

been a trial and a verdict or judgment in such action of trespass.

So in an action of trespass to land the defendant claimed the land as his own freehold but just as the case was called on for trial he consented to judgment for the Plaintiff. ... He afterwards brought an action of ejectment against the then Plaintiff who pleaded the judgment in the action of trespass as an estoppel:-HELD, that as the judgment in the action of trespass being by consent it amounted to nothing more than a judgment by default and was not therefore an estoppel.

An agreement not under seal by a joint tenant selling his moiety and to make a conveyance at a future day (for which moiety he has received

his money) does not sever the tenancy, and there is survivorship.

The Statute 8 and 9 Vict. C. 106 does not extend to the Straits. Twelve years uninterrupted possession of land, is by the Indian Statute of Limitations 14 of 1859, sufficient to maintain an action of ejectment for the recovery of such land. (a.)

The Indian Act of Limitation, (14 of 1859.) is retrospective, as clearly ap-

pears from s. 18.

QUERY .- Is this Court both a Court of Common Law and Equity, and not seperate Courts?

JUDGMENT.

This is an action in the nature of an ejectment brought to recover the possession of a piece of land situate at Tanjong Tokong in Penang, described in the petition as abutting on the East on the sea, on the West on Mr. Tesserand's ground and a small road, on the North on Mr. Tesserand's ground and a Chinese burial ground, on the South on land formerly of Mr. Brown and now of Hoh Leng, which the Defendant is charged with knowingly re-

taining wrongful possession of.

The defendant has pleaded; first, the general issue; secondly, that the lease is not the plaintiffs; thirdly, liberum tenementum, or a freehold in the Defendant; and fourthly, a plea by way of estoppel which is as follows :-- "And for a fourth plea, the Defendant says that the Plaintiff ought not to be admitted to say that he is entitled to the possession of the land in his declaration mentioned or to maintain this action because he says that before this suit he the Defendant brought an action against the now Plaintiff in the Penang Division of the Supreme Court for the same cause of action as in the declaration mentioned, and such proceedings were thereupon had in that action that afterwards and before this suit, it was considered by the judgment of the said Court that the now Defendant was entitled to the possession of the said land, and should recover possession of the said land, and afterwards and before this suit by virtue of the said Judgment, the Defendant entered in possession of the same, and the said judgment still remains in force, and this the Defendant is ready to verify. Wherefore he prays judgment &c." Upon all these pleas the plaintiff has taken issue.

<sup>(</sup>a.) See Ather vs. Witlock, 1 L, R. Q. B. 1.

The defendant put in evidence the record of the case upon which he relies in support of the plea of estoppel. From this record it appears that the Defendant on the 22nd of March 1871 brought an action of Trespass against the present plaintiff in which he alleged, "that he on or about the 17th day of December then last past and divers other days and times between that day and the commencement of the action with force and arms broke and entered certain land belonging to the then plaintiff situate at Tulloh Ayer Rajah in the island of Penang bounded on the East by the Sea 255 feet; West by Mr. Tesserand's ground and a small road 475 feet, North by Mr. Tesserand's and the Chinese burial ground in a crooked direction 1398 feet, and on the South by Mr. Brown's ground 1275 feet." The declaration then went on to charge the present plaintiff with pulling and carrying away betelnuts, cocoanuts and other fruits then growing on the said land and with other acts of waste, for which the present Defendant claimed \$ 100 damages.

The defendant in the suit, (the present plaintiff), pleaded first, not guilty secondly, that the land was not the property of the plaintiff; thirdly, a free-hold in the defendant; and fourthly, that the fruit &c. were not the property of the plaintiff. Issue was taken on these pleas, and the cause came on for trial on the 23rd June 1871, when the defendant confessed the action, and

judgment was entered by consent of both parties for \$ 15 damages.

The present defendant contends that this confession of the previous action, is an estoppel and bar to the plaintiff in the present suit, and the decision on this point depends upon the question whether the same cause of action was at issue in the previous action as that which is now sued for.

The principles which govern the effect of a previous verdict in an action between the same parties are clearly stated by Lord Ellenborough C. J. in Outram v. Morewood, 3 East 346, which was an action of trespass for break-

ing and entering a certain close and digging coal there.

The plea alleged a conveyance of the locus in quo to the persons through whom the defendant claimed, and further that the coal mentioned in the declaration was part of the coal so bargained and sold. The plaintiff replied by stating that the plaintiff had sued the defendant in trespass for breaking and entering the same identical coal mine. The defendant pleaded title, and averred that the coal in the declaration in that action was part of the coal bargained and sold as aforesaid. That the plaintiff traversed the last mentioned averment; that issue was joined in the traverse, and the issue found for the plaintiff, and that judgment thereupon followed, and the plaintiff prayed judgment, &c. &c. Demurrer and Joinder. The replication was held good.

The law of estoppel thus stated in the judgment of Lord Ellenborough (p. 354.) "a recovery in any one suit, upon issue joined in matter of title, is equally conclusive upon the subject matter of such title"; and "a finding upon title in trespass not only operates as a bar to the future recovery of damages for trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession." His Lordship cited a case from Leonard (Anon 3 Leon. 194), where the Defendant in an action of trespass quare clausum fregit, pleaded a former recovery in an ejectione firme brought by himself against the plaintiff for the same land, and the plea was held to be an estoppel, for that the possession was bound by the recovery.

Mr. Woods for the plaintiff has contended, that the doctrine laid down in

Outram v. Morewood, does not apply, because this is an action of ejectment, and as he maintained a verdict inter partes is no bar to a fresh ejectment, and that any number of other ejectments may be brought by the same party for the same premises. This may be so, and that peculiarity in ejectment arose from the facility of varying the title of the plaintiff by alleging a different demise or a demise on a different day, so that the title might always be made to appear different. But if the second declaration exactly resembled the first it is difficult to see why upon recognized principles, a previous judgment should not be pleadable.

In Doe v. Wright, 10 A. and E. 763, it was held that a defendant was estopped by a Judgment against him in ejectment, from pleading liberum tenementum in an action brought against him for the mesne profits. And in the case in Leonard a plea by a defendant in trespass of a former recovery by him in ejectment brought for the same piece of land, was held to be an estoppel, for that the possession was bound by the recovery. The question in the present case does not seem to me to resemble either that in Doe v. Wright or in the case from Leonard. In the present case it appears that the now Defendant brought an action against the present plaintiff for breaking and entering the locus in quo. The defendant in that case pleaded amongst other pleas, a freehold in the premises, upon which issue was joined. If indeed there had been a verdict upon that issue, I think the plaintiff would have been estopped from bringing his present action. But that was not the case; on the day of trial the defendant agreed to confess judgment, and, by consent judgment was entered for \$ 15 with a stay of execution. Now it seems to me impossible to contend that this judgment by confession can have the same effect as judgment after verdict upon an issue between the parties in which the title to the land was in question. This judgment by confession is in effect, nothing more than a judgment by default—that is to say the defendant withdraws his pleas and admits the plaintiff's cause of action as set forth in his declaration. Now what is the cause of action stated in the declaration, it is the breaking and entering the land of the plaintiff, and carrying away certain fruits. We must therefore take it as conceded, that the defendant in the former suit admitted the land to be the land of the plaintiff. but only so far as was necessary to support the action of trespass. And as the mere possession of the land gives a right to maintain trespass, I do not think the present plaintiff is to be taken as having, by his confession, admitted any thing more than the bare naked possession of the then plaintiff. And I therefore think he is not estopped by the former judgment from bringing the present action. The case of *Howlett v. Tarte*, 31 L. J. C. P. 146 shows that a defendant, by allowing judgment to go against him by deaction to which he has a good defence, is not estopped from pleading such defence in a subsequent action against, him by the same plaintiff, if such defence be not inconsistent with any traversable averment in the declaration in the former action. Applying that principle to the present case, I do not think the claim to the right of possession set up by the present plaintiff is inconsistent with the allegation of a de facto possession in the declaration of the petition in the former suit. I therefore think that on the issue raised by the fourth plea there must be judgment for the plaintiff.

I have now to consider the issue raised by the three first pleas which put in issue the plaintiff's title. It appears from the documentary evidence put in, that the land now in dispute was conveyed to three persons named Panjang Emeh, Allang Gandel, and Lebby Drawey, as joint tenants in fee, by a

Deed dated the 26th day of November 1844. Panjang Emeh survived the other joint tenants, and assuming that there was no severance, would have become entitled to the whole land by right of survivorship. Panjang Emeh died about the year 1852, and his widow Fatimah administered. In the year 1869, aPetition was filed on the Equity side of the Court by Essah, the widow and administratrix of Abdul Rahnee, one of the sons of Panjang Emeh, against Fatimah as the administratrix of Panjang Emeh, for the administration of the estate of Panjang Emeh. The defendant put in her answer but instead of the accounts being taken in the usual way, I find that the matter was submitted to arbitration, for what reason I am unable to say, as I should have thought that the accounts could have been taken much more cheaply and efficiently by the officer of Court. And the arbitrator having made his award, the award was on the 12th May 1870 made a rule of Court. A writ of fi. fa. then issued out of the Court in pursuance thereof, and the Sheriff in accordance with the writ caused the land now in dispute to be put up to auction on the 23rd of October 1870. At the sale, the person through whom the defendant claims was declared to be the purchaser, and the land was subsequently, on the 13th December 1871 conveyed to the defendant. The defendant's title-therefore is claimed thro' Fatimah the administratrix of Panjang Emeh, and if it is true that Panjang Emeh, as the survivor, became entitled to the shares of the joint-tenants, then the title of the defendant would primá facie appear to be good.

The plaintiff however asserts that there was really a severance of the jointtenancy, and he contends that the other joint-tenants, Allang Gandel and Lebby Drawey sold their respective shares to him-and effectually although apparently informally conveyed the same to him, so that there was an actual alienation on their part. The plaintiff's evidence upon this head is that twenty four or twenty five years ago he purchased Allang Gandel's shares from him for \$ 50 and that on the occasion of the purchase a Malay paper containing the contract was drawn up by Lebby Drawey and signed by Allang Gandel. A Malay paper has been put in evidence which purports to be this contract, the translation of which is as follows: "In the year 1263 on Thursday the seventh day of the month of Rabilhakir (25th March 1847). Be it known that a Malay man of the name of Allang Gandel came and directed me to have a paper made and given into the hands of Mahomed Joonoos. 'I Allang Gandel do hereby sell a piece of compound land in the district of Tanjong Tokong held in partnership by three persons, Panjang Emeh, Lebby Drawey and me the said Allang Gandel, the grant thereof is numbered 2321 and it is my share that I have sold unto Mahomed Joonoos for the sum of fifty dollars I have received from the hands of Mahomed Joonoos and the agreement between me Allang Gandel and Mahomed Joonoos is that when I Allang Gandel return from Pulo Lancawi I will make out a grant and give the same unto Mahomed Joonoos without question, or answers in future days. Written in the presence of the undersigned witnesses."

<sup>&</sup>quot;This is the mark of the hand of me Allang Gandel a true Token."

<sup>&</sup>quot;Attested by Lebby Drawey, attested by witness Pahlang Bawah."

The plaintiff further states that about a year subsequent to this he purchesed Lebby Drawey's share for \$ 40 and that a paper similar to the preceding was drawn up and signed by him, and that ever since that time he (the plaintiff) has been in possession of the shares in the land thus purchased by him,

The plaintiff contends that the land was effectually conveyed to him by these documents. But although the Act, 8 and 9 Victoria c. 106, is not in force here, yet it appears to me to be impossible to regard this Document as a valid conveyance. It is certainly not a grant, not being under seal, and it cannot, I think, be regarded as a feoffment for two reasons, first because it does not contain words implying an actual conveyance, and secondly because the essence of a feoffment is the solemn and formal livery of seizen of which the writing was, by the common law merely the evidence, (although by the Statute of Frauds a writing became necessary for the transfer of any greater interest in land than an estate at will,) and there is no evidence in this case of a formallivery of seizen.

But the Plaintiff further contends that he has at all events acquired a good title by length of possession. It is clear that by stat. 21 Jac. I. an uninterrupted possession for twenty years not only gave a right of possession which could not be divested by entry, but also gave a right of entry. So that if a person who had such possession was turned out of it, he might lawfully enter and bring an ejectment for its recovery; upon which he would be entitled to judgment. The period of limitation which I have mentioned is that which, in accordance with English law, was in force here prior to the Indian Act XIV of 1859. By that Act, however, it was enacted that "no suit shall be maintained in any Court of Judicature within any part of British India, unless the same is instituted within the period of limitation therein after made applicable to a suit of that nature, and the periods of limitation and the suits to which the same respectively shall be applicable, shall be the following \* "12. To suits for the recovthat it to say : ery of immoveable property to which no other provision of this Act applies -the period of twelve years from the time the cause of action arose," This Act therefore, as to all actions subsequent to the Act, swept away the English law which previously existed, and for a period of twenty years, in suits for the recovery of land, substituted a period of twelve years: since that Act therefore twelve years of uninterrupted possestion forms a positive prescription, and the impression which seems to have prevailed at the bar during the argument, that the Act of 1859 did not apply in this case, seems to me to be erroneous. Its retrospective effect is clear from the 18th section, by which "all suits to which the provisions of the Act are applicable that shall be instituted after the period of two years from the date of the passing of the Act are to be governed by the Act and no other law of limitation."

According to the evidence of the plaintiff he farmed the land himself after the purchase from the two joint tenants, and then let it out to Sitamby. Mahomed Ibrahim however differs somewhat in the account he gives. He says that after the purchase from Allang Gandel and Lebby Drawey, Mahomed Joonoos used to manage the land, and that Panjang Emeh (the other purchaser) used also to rent out the land.

But he states that his brother Sitamby farmed the land from the commencement. He also said that he rented the land from Joonoos about 8 years ago for a period of 5 years. Sitamby it appears, died 8 years ago and at that time \$ 14 were due by him for rent, which sum, Ibrahim states, he paid to Joonoos. On cross-examination this witness stated that Sitamby first rented the land for 10 years from the three joint-tenants, and afterwards from Mahomed Joonoos and his father. The date of the death of Panjang Emeh is not fixed positively, but it seems to have occurred about the year 1852.

PENANG. 364

Mat Akib states that he has seen the plaintiff exercising authority over the land in dispute for the last 10 or 11 years.

The evidence of the plaintiff's witnesses has not been contradicted, in any material part, by the witnesses for the defendant, and I think that the plaintiff has succeeded in shewing that he was in possession of the shares in the land purchased by him from the joint tenants for more than twelve years prior to the entry of the defendant.

I therefore think that there must be judgment for the plaintiff for two thirds of the land described in the deed of the 26th of November, 1844.

### 19th September 1872.

BEFORE SIR WM. HACKETT, Knt. Judge of Penang

Mah Keow by her next friend Che Em vs. Cheah Hit otherwise

called Low Tway and others.

If an infant, knowing himself to be under 21 years of age, enters into a contract, but is ignorant, at what age a person is said by law to cease to be an infant, and is accordingly silent as to his age, by which the person with whom he contracts, is deceived; that is not a fraud on his part, which will estop him from applying to a Court of Equity to set aside such contract.—The defence of being a purchaser for valuable consideration without notice, cannot be set up, unless such defence is specially set up by way of answer or plea.

SEMBLE.—An infant is entitled to apply to a Court of Equity to set aside his

contract, even if he obtained a benefit thereby

This was a suit on the equity side of the Court praying that a certain Deed made between the parties to this suit, mortgaging a piece of land of the Plaintiff to the 1st named Defendent for \$ 300; may be ordered to be given up to be cancelled on the grounds of fraud and duress, and that the Plaintiff was an infant at the time of the execution of the Deed. The Defendants in their answer denied generally the frand and duress and that the Plaintiff was an infant. The money raised by the mortgage was said by the Plaintiff to have been wholly received by the 2nd named Defendant. The Defendants admitted that one of them, namely, the 2nd named Defendant, had received a part of the money, but maintained that the Plaintiff had received the balance, which, according to the accounts of the Defendants themselves, was only \$98-50. There was no evidence of the 1st Defendant participating in the fraud or duress, or that he had notice that the Plaintiff was an infant at the time the said Deed was made; but there was evidence that Plaintiff knew at the time that she was under 21 years of age.

JUDGMENT.

In this case Plaintiff made a mortgage of her property in which she had a life interest and she has now come into Court and asks to have this mortgage Deed set aside. She alleges that about four months before the suit was commenced the Defendant Poh Oh being in embarrassed circumstances together with his wife the Defendant Nem Boey asked her to execute together with them a

certain paper writing mortgaging her lands but she refused to comply with this request and thereupon the Defendant Poh Oh beat and assaulted her and then with force compelled the Plaintiff to leave her residence and then brought her to Town to the house of one Mungoh where the Defendant Cheah Hit was at the time and then all three of the Defendants compelled her to and she did then through fear and against her will and consent sign and seal together with the Defendants Poh Oh and Nem Boey the aforesaid Deed of mortgage. But the evidence does not bear this out. The Plaintiff entirely failed to make out the duress. Mr. Aeria and the other of the witnesses all say the Plaintiff signed the Deed willingly and did not appear to have been forced to do so. On the whole I think she has failed to establish her case for relief on this ground. But the Plaintiff also says she is an infant and the Deed on that account is voidable or void and must be set aside. is clear that an infant is incompetent to enter into any contract and may at any time apply to set it aside. The Defendant Cheah Hit does not set up that he was defrauded, and has not pleaded that he was a purchaser for valuable consideration, without notice, and according to strict law a person is not entitled to that privilege unless he pleads it. But in this case, no actual fraud on the Plaintiff's part was proved, to entitle the Defendant Cheah Hit to retain the mort-It has been held that if an infant knowing that he was an infant and enters into a contract. but hides the fact that he is an infant and stands by he will not afterwards be allowed to set up such infancy, to set aside the contract; but where he is ignorant of the fact at the time, and remains quiet, by which the person with whom he contracted is deceived, still he can apply to set aside the contract. In this case I think there was no fraudulent intent. The Plaintiff no doubt knew at the time she was under the age of 21 years but did not know at what age a person attained his or her majority and probably did not know it would have made her Deed bad or what the effects of it on the Deed were (a) I dare say the greater part of the natives here are not aware of the effect of infancy on a contract; and I therefore, think she is not disentitled to set aside the mortgage as far as she is concerned. It is a hard case on the Defendant Cheah Hit, but as the Defendants Poh Oh and Nem Bocy have a contingent interest in the land mortgaged, he is entitled to retain that as a continuing security. The Deed therefore as far as plaintiff is concerned must be cancelled (b)

<sup>(</sup>a) This was an ignorance of the law, and not of fact, and ought not to have been excused, even in a Court of Equity. See Broom's L. Max. "Ignorantia facti excuset. ignorantia juris non excusat."—p. p. 231, 240.

(b) See also Nelson vs. Stocker, 28. LJ. CH. (N. S.) 760.

# 1st November, 1872. Before Sir Wm. Hackett, Judge of Penang. Ho Ghee Sew vs. Nacodah Mahomed.

A party wishing to proceed here against another for an offence committed by the latter in a Foreign State must proceed under the Acts 1 of 1849 and 7 of 1854 and the information for a warrant to apprehend such latter person for such offence must comply with the provisions of those Acts and must disclose such facts as to bring the case within the Acts, otherwise such person cannot be proceeded against for want of jurisdiction.

If a Magistrate after granting a warrant afterwards finds he has acted illegally by exceeding his jurisdiction. he can order such warrant not to be proceeded with even if it be issued and is at the time in the hands of the Police.

This was an application for a Mandamus to be issued to the Magistrate commanding him to grant a Search Warrant against certain tin in Defendant's possession alleged to have been stolen and resmelted and brought here by him for the purpose of selling the same. The Magistrate had, on application for the Warrant first of all, granted it, but on consideration he withdrew it on the ground that he had no jurisdiction as the tin was stolen at Laroot a place beyond the jurisdiction of this Court.

JUDGMENT WAS DELIVERED ON THE 11TH INSTANT.

Mr. Woods moved in behalf of Ho Ghee Sew and Wong Pak Leng, for a rule calling upon D. C. Presgrave Esquire, the Magistrate of Police for Penang, to shew cause why a writ of Mandamus should not be issued against him compelling him to cause the Search Warrant mentioned in the affidavit to be executed. It appears from the affidavit filed on behalf of the applicants that an information was laid before the Police Magistrate on the 1st inst. in which it was stated that Pak Leng and Ho Ghee Sew, two residents of Penang were possessed of a large quantity of tin, which was stored at Laroot last month, and was marked with the respective chops of the proprietors, Chin Lee and Wah Eng. That they were informed and believed that this tin had been stolen and carried away by one Ismail at Laroot who had placed a portion of it on board a vessel commanded by one Mahomed, and sent it to Telok Serah in Largot where it was resmelted and the marks obliterated by the direction of Mahomed. The information went on to state that 124 of the slabs so resmelted had been brought to Penang by Mahomed in his vessel, and were then in the harbour of Penang on board this vessel, and that if a Search Warrant were not granted to search for and seize the tin, the same would be sold and disposed of. It further appears from the affidavit that the Search Warrant was granted and the tin was seized but that the Magistrate subsequenty ordered it to be released. Here then we have a crime

committed in a foreign country by persons who are not alleged to be British subjects and who must I think be assumed to be foreigners. By the Common Law no county justice in the Colony has jurisdiction to try such a crime, and there is no statute with which I am acquanited, which confers any such jurisdiction. There are certain exceptions to the general rule, as in the case of crimes committed on the high seas by British subjects, or in British vessels, and also in the case of piracy jure gentium. There is also the Indian Act 1 of 1849 by which all British subjects, and all Government servants whilst actually in such service and for six months afterwards and also all persons who shall have dwelt for six months within the territories of the East Indian Government, who shall be apprehended within the said territories, shall be amenable to law for all offences committed within the territory of any Foreign Prince or State. But it is clear that the present case does not fall within any of these exceptions and that as far as it appears from the information, it is altogether out of the cognizance of the Courts of this Settlement. Mr. Woods in support of the motion has contended that the Magistrate having once issued the Warrant was bound to proceed with it and had no right to release the property. But I conceive, that if, after issuing the Warrant, the Magistrate thought that it was a case in which he had no jurisdiction he had a perfect right to decline to proceed any further in the matter. Mr. Woods also relied on the cases of R. v. Kimberley, 2. Str. 848 and Mure v. Kaye, 4 Taunt. 43, to shew that the Magistrate has jurisdiction in the case of crimes committed in foreign countries. But it appears to me sufficient to say that there is no analogy between those cases and the present. In those cases there were persons in custody on the charge of having committed crimes in foreign countries-and the question was whether they should be detained for the purpose of being handed over to the authorities of the place where the offence was cognizable. Here there is no charge made against any one, there is no one in custody and the question is whether the Magistrate is bound to selze the goods alleged to be the proceeds of a crime committed out of the limits of this Colony, and as to which the Courts of this Colony have no jurisdiction, on the chance of some charge or other being brought against some as yet unascertained person. I will not go so far as to say that the Magistrate would have acted illegally in seizing and detaining the goods, but I think it is a case in which very great caution was necessary and that he exercised a sound discretion in declining to proceed when the question of jurisdiction was so doubtful and the whole proceedings so vague and indefinite

I may also remark that Mr. Forsyth in his work on Constitutional Law p. 370 throws some doubt on the case of Mure v. Kaye 4. Taunt 43, where the crew of a Dutch ship having mastered the vessel and run away with her, the question arose whether the English authorities could seize them and send them to Holland. and it was held, they might. Upon this case Mr. Forsyth observes: "But I cannot understand how this could have been done without the authority of an Act of Parliament. In former times, however, there was a laxity of practice in many things which would not be allowed now." Recent legislation in England has dealt with the question of extradition and I apprehend that now no English Court or Magistrate would deliver an accused person, to the authorities of a foreign power or State without the direction of an Act of Parliament. In India, also, there is the Act VII of 1854. which provides for the apprehension within the territories under the Government of India of persons charged with the commission of heinous offences beyond the limits of the said territories and for delivering them up to justice. I apprehend that if it is the object of the prosecutors in this case to apply for the extradition of any persons charged with the commission of any crime that they should proceed under the provisions of this Act. It is true that when a person is charged with a beinous offence under Section 21 of that Act, and his immediate apprehension may, in the opinion of the Magistrate, be necessary for the ends of justice, the person accused may, without an order of Government, be apprehended and proceeded against in the same manner as for an offence charged to have been committed in the place where the person accused shall be found; and after his apprehension he shall be committed. But in the present case, there is no person charged, and the only apparent object of the information is to secure the goods, whereas, the object of the Act is to prevent the criminals from escaping. Mr. Woods has also argued that it is possible that some persons may have been guilty of some offence, in connection with the alleged stealing, committed within the limits of the Settlement: when such a charge is made it will be time enough to deal with it, but in the meantime, as the information does not disclose any offence cognizable in the ordinary way by the tribunals of this Colony, I must decline to speculate on whether possibly some persons at present unascertained, may not have been guilty of some offence. undefined in connection with the alleged crime, committed within the jurisdiction of our Courts, and I must certainly decline to force that view upon the Magistrate. A case has been referred to as having lately occurred in London, where a person was charged

with being in possession of certain articles, the proceeds of a larceny. An application was made to the Court for his release on the ground that the larceny in question had been committed in Russia, with which country England has no Treaty for the mutual extradition of Criminals. The Court however ordered the prisoner to be remanded. But this case as it appears to me does not prove that if the Court had thought fit to discharge the prisoner it might not have done so. There can be no doubt that the jurisdiction of Criminal Courts is local, and only extends to crimes committed within the territorial limits assigned to them. The extradition of persons charged with the commission of crimes committed in foreign countries is a political not a judicial proceeding. and depends, as Wheaton says, on reasons of State and not on rules of law. Public Jurists are divided as to how far a State is bound to deliver up persons charged with crimes committed in another country upon the demand of a foreign State. Some distinguished writers, such as Grotius, Heineccius, Vattel, and Kent hold that, in the case of crimes affecting the general peace and security of society, extradition is demanded by the country whose laws have been violated, as a matter of right whilst other no less distinguished names support the opinion that extradition is a matter of Imperfect obligation, and only depends on mutual comity and convenience, unless it is confined by special compact. If we may judge by the practice of nations in modern times, the latter opinion is now generally accepted, as it is not now the custom to demand the surrender of criminals except in accordance with treaty obligation. Upon the whole case I think the inrisdiction of the Magistrate does not sufficiently appear in the face of the information, and that he has exercised a sound discretion in refusing to proceed further. The rule is refused.

Rule Refused.

22nd January, 1873.

Before Sir Wm. Hackett, Knt, Judge of Penang. Fredericks and others vs. Dunlor and others.

A Shipping Order to the following effect "To the Commanding Officer of the S. S. "T." Please receive on board 100 tons tin for L. @ 3/10 per twenty cut." signed by the Defendants and given to Plaintiffs. HELD a binding contract on both parties and that parol evidence to shew that Defendants contracted merely as Agents was not admissible and in-as-much as the "T" through the default of the owners, the Defendants' principals, did not arrive whereby the goods could not be sent by her but had to be sent by another vessel, the Defendants were personally liable for the breach of the contract.

SEMBLE .- A Shipping Order of this kind however is subject to any mer-

PENANG. 370

cantile usage in the place where made and if by such usage the Defendants are not personally liable they could not be held to be so.

There is however no usage in Penang as to instruments of this nature as to

the non-personal liability of the Defendants.

SEMBLE.—The measure of damages in such a case would be the difference between the two rates of freight or otherwise according to circumstances, and if no actual ldss was sustained by Plaintiffs they would be entitled to nominal, damages only.

This was an action to recover damages for breach of contract. The defendants pleaded the general issue on which issue was joined.

Mr. Logan (Solicitor General) appeared for the plaintiffs.

Mr. Bond,-For the defendants.

THE JUDGE.—This was an action to recover \$ 700 for breach of The Petition alleges that the defendants by a shipping order required the Commanding Officer of the steamer Thales to receive on board 100 tons of tin for London-it then averred that all condition precedents were performed and had happened, yet the defendants would not permit the tin to be shipped, by means of which plaintiffs lost divers profits, which they would have gained if defendants had completed their contract and incurred expense in sending it on in another ship to London. The defendants deny the agreement on which issue has been joined. The plaintiffs are merchants carrying on business under the name and style of Messieurs Fredericks & Co. The defendants are also merchants carrying on business under the name and style of Messiems Fraser & Co. The evidence at the trial shewed, that on the 13th October 1873 the plaintiffs received an order from one of their London constituents to purchase and send them 105 tons of tin. They thereafter purchased the tin and asked defendants to allow them to ship it by the Thales. On the 4th November, Mr. Gentle the Manager of Messieurs Fraser & Co's firm wrote to Mr. Fredericks stating that the Thales was at Singapore and would be here in a few days thereafter and asking him if he wanted a shipping order for the tin he had wanted to ship. To this Mr. Fredericks replied he was glad the Thales was coming in and asked for a shipping order for 100 tons tin, and some tapioca and tobacco. The shipping order was accordingly forwarded and is as follows:-"No. 2. To the Commanding Officer of the S. S. Thales, Sir, Please receive on board 100 tons tin for London @ £ 3-10/ per twenty cwt." and this was signed "p. pro. Fraser & Co. Alex. Gentle." Plaintiffs after this telegraphed to their principals saying the things were to be sent by the Thales. Shortly after dofendants' Agents at Singapore telegraphed to them to say, that the Thales had been sold to Chinese and to recall all shipping orders already issued. Mr. Gentle thereupon wrote to Mr. Fre-

dericks telling him the Thales was not coming as she had been sold. The plaintiffs lost no time in holding the defendants responsible and got their lawyer to write to defendants saying that they will hold the defendants for all loss and damage sustained by the non-arrival of the Thales. On the 16th, plaintiffs' lawyer wrote to defendants to say, that the tin had been shipped in another vessel and that they would hold defendants liable for all loss they may sustain thereby. To this letter defendants replied acknowledging receipt of it and saying that the plaintiffs had no claim on them for the non-arrival of the Thales. On the 24th November, plaintiffs' lawyer sent defendants a Memo, of their claim for loss on tin &c. &c., shipped on board another vessel at £ 5 per twenty cwt., to which defendants replied that they did not admit the claim of the plaintiffs and promised to forward their letter to the proper quarter but could give no hopes of their obtaining what they wanted. From the correspondence, there it seems, the plaintiffs claimed all loss they sustained in shipping the goods by the other vessel on account of the non-arrival of the Thales. Mr. Bond the counsel for the defendants resisted the claim on two grounds-1st,, that the shipping order was not a binding contract and that parol evidence could be given to shew that defendants contracted merely as Agents, especially as time which was essential to the contract was not mentioned. But I think there is a sufficient contract and that there was an implied undertaking that the vessel would come to Penang and would take the goods, and that it is only material to consider whether defendants had committed a breach of their contract. It is clear, the letter of the defendants appouncing the arrival at Singapore of the Thales confirms what I have stated, there is an implied contract I think, that the vessel would arrive here within a reasonable time-say about the 15th November. There is nothing in the order or letters to shew defendants contracted as Agents merely, in fact the word "Agents" is not once even mentioned. The defendants merely say "We can give a shipping order," and the plaintiffs' reply "please give us a shipping order." I am therefore of opinion that there is a complete contract in writing and therefore parol evidence to shew that defendants contracted merely as Agents is inadmissible (a). The defendants even never told the plaintiffs that they were contracting merely as Agents. It is said plaintiffs knew of it; assuming that they did, but still as the contract in writing does not

<sup>(</sup>a.) See Higgins vs. Senior, 8 M. & W. 834. Jones vs. Littledale, 6 A. & E. 490 per Lord Denman. Paterson vs. Grandusequi 15 East 62, 68, 69—and Thompson vs. Davenport, 9 B. & C. 78.

mention a word about it. I think the defendants are liable as principals on the contract. Secondly, Mr. Bond contended that even assuming there was a complete contract and that defendants were personally bound in point of law still the contract is subject to certain mercantile usages which he contended was proved in this case on instruments of this kind. Mr. Gentle in his evidence says, the shipping order is issued when the steamer is in a foreign port and must arrive here before it can take effect. According to Mr. Gentle's evidence, four conditions must be performed before the shipping order is binding-1st., the vessel must have commenced her voyage; 2nd., she must arrive at the port where the goods are intended to be shipped; 3rd, there must be sufficient room on board of her to take in the goods; and 4th., that there must be enough room so as not to spoil any goods already on board. Mr. Tolson of Messieurs Lorrain Gillespie & Co. of Penang was called to support Mr. Gentle. He did in some respects do so, but doubted whether if all these conditions had been performed and yet the defendants refused to complete the contract whether they would not be liable because they were Agents. The order in a note states, the condition to be, that there be room in the vessel, but nothing is said as to her safe arrival. In opposition to these, several gentlemen, some of the leading merchants here were called. Mr. Allan, of Messieurs Sandilands Buttery and Co., considered that the agreement was binding and that there were no other conditions to it, except those expressed in the contract, but he considered that the defendants only acting as Agents it would be impolitic to hold them liable. Mr. Scott, of Messieurs Brown & Co., considered the order binding on both parties and applied to ships as well as to Steamers. Mr. Anthony, of Messieurs Anthony & Co., considered the contract as binding. Mr. Padday. of Messieurs Wm. Hall & Co., considered the contract binding on the parties but that the ship owners were liable for the non-arrival of the vessel. Mr. Mackie, of Messieurs Bonstead & Co., considered the contract binding-from these witnesses it appears that the non-arrival or want of room on board is not a condition precedent unless so expressed. Claims like the present it also appears have never been made, though often things like the present have happened. Upon the whole evidence then, I think, there is no usage as the kind contended for and that I must decide this case by the contract itself. It is unnecessary to consider whether the defendants would be liable if the Thales never arrived here. either by being lost or otherwise, as there is no plea to that effect on the record. It is clear a breach of the contract was committed.

after agreeing that the vessel should come here the owner wrongfully sold her by which defendants are made liable. It is no excuse to say that the contract was made impossible by the act of a third party. Mr. Justice Blackburn in Taylor vs. Caldwell, 32 L. J. Q B. (N. S.) 166 says, "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible." (a) I therefore think, there was a breach of the defendants' agreement on the 4th November and that they. are liable to the plaintiffs for the loss they have sustained thereby. No doubt at first sight this rule of law appears a very hard one, but as one of two innocent parties must suffer by the fraud of a third, and the defendants here have neglected to protect themselves. whilst entering into the contract, they must bear the loss sustained by the plaintiffs. The question of damages it has been arranged between the parties should be referred to arbitration, so it is unnecessary for me to ascertain the amount. There will therefore be indement for the plaintiffs, the amount of damages being referred to arbitration

Before I conclude I must thank Mr. Woods for the case mentioned by him where the same question as here, was raised at Calcutta. The case clearly shews the shipping order is a binding contract, and the only difference between that case and the present is that, there the vessel was in the harbour and the goods. could have been shipped immediately. The judgment of the case is valuable as shewing the principle how the damages are to be assessed. The Judge of the Court below non-suited the plaintiff, as he was of opinion that the goods sent on by them by the other ship not having then arrived, the damages they had sustained could not be ascertained, but on appeal to the High Court this decision was reversed, the Court being of opinion that the cause of action was complete the moment defendants broke their contract, and that the damages therefore could be ascertained by either the increase rate of freight or otherwise, according to the circumstances. The right to sue did not depend on the arrival of the vessel but arose the moment the breach was committed; if there were no loss sustained, then the plaintiff would be entitled to nominal damages only. In the present case the plaintiffs have sustained actual damage. The case mentioned shews clearly the very principles governing the question of damages in the present

<sup>(</sup>a.) Also see Hill vs. Sugune 15 M. & W, 253.

case. The performance of the voyage by the other vessel is not a condition precedent, and the damages must be ascertained according to the ordinary measure, namely, the difference between the two rates of freight.

Judgment for the plaintiffs.

See Brinkmann Kumpers & Co. vs. Rautenberg Schmidt & Co. reported in the Straits Times of 7th June 1876; a case somewhat similar to the above was heard before Sir T. Sidgreaves C. J. and judgment was given for the plaintiffs.

S. L.

#### 6th May, 1873.

## Before Sir Wm. Hackett, Knt, Judge of Penang. Thompson vs. Puah Toh.

The Court will not grant a new trial simply on the ground that Counsel has not called several witnesses whom the client wished to be examined first, as the Counsel must be allowed his discretion, (unless he has acted contrary to his client's express instructions, which must be proved in the clearest manner,) and secondly, as by granting a new trial it will simply be opening a door to fraud and perjury.

This was a rule to shew cause why a new trial should not be granted—several affidavits were filed on both sides which are not here set out as the sum and substance of them appears fully from the arguments and judgment.

Mr. Woods.-This was an action on an agreement as surety, there were two pleas; first, did not agree; and secondly, a plea shewing that by Plaintiffs conduct. Tech Tong for whom Defendant stood surety was unable to perform his contract. The case was tried before this Court and judgment given for Plaintiff. The Defendant made an affidavit, stating that Mr. Rodyk his Counsel had declined to call his witnesses. Mr. Rodyk filed an affidavit in reply, stating that he did not call the witnesses as what they could prove was, what the Plaintiff in his cross-examination had already admitted, but which evidence, the Court had held, was inadmissible under the pleas pleaded and had refused leave to amend, and as to the question whether the said Tech Ah Tong had a sufficient number of men according to the contract, they just proved the very contrary, namely, that 45 men or thereabouts were the most he could manage to get and in consequence thereof he had not called them. Puah Toh the Defendant made a further affidavit, stating that Mr. Rodyk must have forgotten the facts of the case as the witnesses could prove not only the Plaintiff's cruelty but also that Teoh Ah Tong had a sufficient number of men. Mr. Rodyk replied to this denying generally the whole affidavit. I submit that it is very apparent,

first, that it was a surprise to the Defendant that his witnesses were not called. The surprise is—were the persons had been Europeans, who speak and understand English, it would be different, but here the Defendant is a Chinaman, who can't do either—secondly, the witnesses were in Court with the Register of the coolies which would have had a great weight in the case and yet were not called nor was the Register produced.

THE JUDGE.—That is inconsistent with Mr. Rodyk's Affidavit.

Mr. Woods—If the book had been put in evidence it might have contradicted Mr. Thompson's books and had some effect on the Court. Even on the plea of non assumpsit, the Defendant was entitled to judgment on account of Plaintiff's misconduct, he assaulted and beat the coolies, and altogether this is a very hard case on the Defendant.

THE JUDGE.—Mr. Thompson was examined and cross-examined on that point.

Mr. Woods.—This is a case of great hardship, I would beg the Court in this man's peculiar position to grant a new trial, we paying costs incurred and giving security for future costs if required.

Mr. Logan -I submit the Defendant has not made out such a case as to entitle him to a new trial, every man who loses his case is dissati-fied and scruple not to make charges against Counsel. There was a great deal of time between the trial and the judgment. and the Defendant never thought then of complaining, no sooner he sees judgment is given against him, he turns against his Counsel, and if applications of this kind be encouraged there will be no end of cases of this kind. His own affidavit shews, he has no case, only two witnesses are mentioned but when he makes his affidavit in reply he mentions a third, named Tan Ah See, not mentioned in his first or Mr. Rodyk's Affidavit. It simply shews that he does not scruple how far he goes, as long as he can attain his object. Mr. Thompson admitted the assault and that he was fined \$1 by the Magistrate, and Mr. Rodyk exercised a proper discretion in not calling witnesses to prove what had already been elicited in cross-examination. He wants the Court to believe that Mr. Rr. Rodyk omitted a most important point in his case.

THE JUDGE.—It is an improbable story any person of the least knowledge of law and his business would not have done this.

Mr. Logan.—The story of the account books is improbable, Mr. Rodyk could not have refused such a thing.

THE JUDGE.—It is clear if Defendant really had such books it was the duty of his Counsel to have produced them.

Mr. Logan. - If this application is granted it will be opening

a door to fraud and perjury. I submit upon the case made out by Defendant, the Court will not grant a new trial. In Chitty's Arch. Prac. Vol. 2 at pages 1515 and 1519, the general rule is laid down. So in Hall vs. Stothard, 2. Ch. Rep; Sponge vs. Hogg, 2 Wm. Black; and also a case in 1 Wils. I submit the case made out by Defendant shews nothing for a new trial, and this rule must be discharged.

Mr. Woods.—The cases cited, are with regard to the English practice and don't apply here, at least where the parties or any one of them are natives. We must follow the Charter which requires everything to be done according to "justice and right." The Defendant here being a Chinaman, knew nothing of what was going on. The story that Teoh Ah Tong had only 45 coolies is improbable, if such was the case, it would have been absurd for him to have come and defended an action on a contract, by which 100 men were required. There must have been some surprise and the Court will on that ground grant a new trial.

THE JUDGE.—I think, I must refuse this application, if I grant it, it will be opening a door to fraud and perjury. The whole evidence now proposed to be given appears to be entirely an afterthought, a month elapsed and nothing was done by Defendant. It is clear, if the facts are as stated by Defendant, he would have had a complete answer to the action. If there had been 100 men, there could have been no breach of contract, but no such case was made out. On reference to my notes, I see, Defendant alone was examined, and no witnesses were called. The story he now tells, shows that Counsel grossly misconducted the case, but that he allowed more than a month-several weeks-to elapse without making any complaint. I have to decide first, which story I have to believe, and I must say taking all the facts and facts appearing at the trial, and taking Defendant's own affidavit I have not the least hesitation in saying, I believe Mr. Rodyk's account and do not believe the Defendant's story. I believe as stated by Mr. Rodyk, that he was informed by the witnesses whom he examined. that Tan Ah Tong managed to get only 40 or 50 coolies. Mustan. Plaintiff's witness, clearly proves this—he says 25, 27, generally worked, 45 was the highest number Tan Ah Tong managed to get-this entirely agrees with Mr. Rodyk's statement. It appears to me also that his statement is most probable. The case of 100 coolies was never attempted. The case attempted, but broke down, was, that he did not fulfil his contract on account of Plaintiff's cruelty. I have no hesitation in saying, I fully believe the whole amount of Mr. Rodyk's Affidavit. I think, I must refuse this application on every ground; 1st., Counsel must be allowed his discretion, unless he has acted contrary to his client's express instructions, this is the practice at home, and this must be proved in the clearest manner; as in the Swinfen Case where Sir Frederick Thesiger was held not justified in his conduct; secondly, if I grant it, I will be opening a door to fraud and perjury. On both grounds, I must refuse this application.

Rule discharged.

BEFORE His Honor Justice T. T. Ford, Acting Judge of Penang. LAMB, vs. PONEN and others.

Certain persons entered into a contract for labour but just six days before the expiration of the term refused to work any further and were summoned before the Magistrate but were brought up after the expiration of such term:—
HELD on Appeal that the Magistrate had jurisdiction under the Act XIII of 1859, to order the men to return and work out the six days and also for such other times they had refused to work.

Penang Gazette, 26th September, 1874.

A case of more than ordinary importance to the Planters of Province Welesley was argued before Mr. Justice Ford on an appeal from the decision of Mr. Maxwell, the Magistrate of Police of Province Wellesley. Mr. Ross appeared for the Appellant. The Respondents were unrepresented. The facts as stated are as follows:—On the 6th August 1872, a gang of Madras coolies, in consideration of a certain sum of money being advanced to them to cover the cost of their passages from Negapatam to Penang entered into an agreement with Messrs. Brown & Co., the owners of the Prye Sugar Estate, to work there for a period of 24 calender months.

On the 31st July 1874 the men stopped work on the ground that their contract had expired. The Manager of the Estate, explained to them that they had to work on till the 5th of August; but the men would not "turn to" and were consequently brought up. The case came on for hearing on the 10th of August; when after a brief enquiry into the facts the Magistrate declined to make any order as he considered that, the contract having expired on the 5th, he had no power to send the men back to the Estate, although he was of opinion that the men had been guilty of a breach of contract in not having worked from the 31st to the 5th. Against this decision the Appeal was instituted.

JUDGMENT of the Court was delivered on the 23rd September 1874 and is as follows:—

In this case the Appellant Mr. Lamb is the agent of Messrs. Brown & Co. and he or his principals entered into the contract for

labour which I now have before me. The principal features of this contract,—to which, as I shall have to refer to them again I will briefly allude now,—are a provision for the service of the Respondents as labourers with the Appellant for a term of 2 years, (the Appellant advancing a sum of money for their passage from India, to be repaid out of the wages of the labourers); a clause which binds the labourers to work beyond the 2 years if the advance is not repaid within that period; a clause which states what proportion shall be deducted from the monthly wages to repay that advance; a further clause which binds the labourers, in case any of them leave the employment of the Appellant, or be unable or unwilling to work, or be confined in the House of Correction or elsewhere for breach of the agreement, to make good whatever loss of labour or of money may be thereby caused; and, lastly, a clause which sets out the consideration for which the labour is given.

The Respondents are two batches of labourers, parties to this agreement, who severally admitted before the Magistrate their refusal to work the last 6 days of the unexpired term of their agreement, and that there were certain other days during the running of the agreement upon which, from inability or unwillingness, they did not work. The Appellant, upon these facts, applied to the Magistrate for an order under Act XIII of 1859, directing the Respondents in the one case to work out the 6 days they had refused to work, and, in the other, to work out the days on which, during the earlier part of their time, they had been "unable or unwilling to work." The Magistrate declined to make the order, and I have now to determine whether his decision was correct. I may express my regret in limine that the Magistrate has not been represented in the argument, and that I have therefore no knowledge of the reasons by which he reached his conclusions. From another case which has been sent to the Court for its opinion, and in which a Mr. Vermont is the Appellant and the same points are raised as in this, (but in which the advance had not been paid up and the Magistrate ordered the labourers to return to their work and continue it until the advance was repaid). I am left to the conjecture that he may possibly have considered the Act of 1859 as limiting his power to order labourers to return to their work to cases in which the advance had not been paid up. It may be as well, perhaps, to say that in the opinion of the Court this would not be a proper construction of the Act, and to state the reasons which have guided the Court to this conclusion.

It is quite clear from the language of the 1st section of the Act that its provisions apply only to cases of contracts for labour upon

which a sum of money has been advanced, but the section which defines the Magistrate's powers in such cases is the 2nd and is as follows:—

"If it shall be proved to the satisfaction of the Magistrate that "such artificer, workman, or labourer has received money in additional and the complainant on account of any work, and has "wilfully and without lawful or reasonable excuse neglected or "refused to perform or get performed the same according to the terms of his contract, the Magistrate shall, at the option of the "complainant, either order such artificer, workman, or labourer, to repay the money advanced, or such part thereof as may seem to the Magistrate just and proper, or order him to perform or get performed, such work according to the terms of his contract &c. &c."

That this section contemplates the action of a Magistrate in cases where the advance has been paid up seems to me clear; firstly, because, had it been otherwise, the section instead of describing the occasions upon which his powers were to be exercised as "where the labourer had received money from the complainant on account of any work," would necessarily have confined his powers to cases in which the whole consideration money had been prepaid; and secondly, because the whole language of the section shews that his power to order work to be done is co-extensive with the work to be performed by the terms of the contract itself. His power indeed to order the repayment or payment of money seems clearly confined to the case where the advances have not been re-paid, and where these have been paid his jurisdiction as to ordering payment of money ceases. To put the case shortly,—when money is due, the Magistrate may order the labourer to pay: when work is to be performed, the Magistrate may order the labourer to perform the work, whether the advance has been repaid or not.

That being the construction of the Act, let us consider its operation upon the facts of the present case; and I would preface this consideration by the observation that the Court is not at liberty to consider whether the conclusion it reaches, bears hardly upon one side or the other. Its duty is only to give the proper legal construction to the words of the contract and apply the Act accordingly. The arguments which were addressed to the Court as to the hardships of any particular construction, cannot be allowed to affect its judgment upon a simple question of the meaning of language.

The first case the Court has to consider is that of the labourers, who, having agreed to work by the terms of the 1st clause of the

contract for 24 calender months from the 6th of August 1872, struck work on the 1st of that month, refusing to work the remaining 6 days. The Magistrate although of opinion that the men had broken their contract, declined to order the men to return to work; but, beyond what may be gathered from an expression tending to show that he thought if the full term of the contract had expired he had no jurisdiction, there are no means of ascertaining his reasons for refusing the order. If clause 1 of the contract stood alone, a very literal interpretation of its language might. perhaps, support this conclusion; but in the view I take of the case, viz., that the labourers in such case are bound under Clause 3. the point does not become material, If, however, as I am informed, the summons was taken out before the 6th of August. although not heard until the 11th, the argument would clearly not be sustainable, the employer being clearly soon enough for his remedy. The decision of the case, however, seems to me to rest upon the answer to the question. Whether the case of these men and of the other class who omitted to work at an earlier period of the term for which they engaged, falls within the provisions of the 3rd Clause? Does the breach of their engagements by these two bodies of men under the stipulation that they "shall make good the loss of labour or of money" incurred by the breach, confer upon the planter a right to have his loss repaid in kind or only by a money equivalent through the process of a civil action? To get the answer to this question the Court has simply to put the correct construction upon the term "to make good." The expression is no doubt not so full and consequently not so clear as it might be. It has a double meaning, readily illustrated. case of a tenant who undertakes to make good all injury, or even wear and tear to the premises leased, during his holding affords one illustration. His undertaking is not merely to pay money for the damage to the tenement. He is bound, should the landlord require him, to make good the damage in kind, to leave him the tenement in the condition he took it. It may be that the owner as a general rule takes a sum of money as damages. That however is for his own convenience and cannot interfere with his right to specific performance if he wishes it, and can get a Court to enforce it. It is the latter difficulty, as Courts of Equity limit their enforcement of contracts for specific performance to a limited class of cases, which usually induces the party to forego their right in consideration of a pecuniary indemnity. The other class of cases, where, from inability to make good in kind, a pecuniary compensation for a breach of such an engagement is the only remedy, affords numerous illustrations. A familiar one would be a contract to make good any injury done in the use of cattle or animals hired for agricultural or other work. Mr. Webster, in his well known dictionary, gives to the term two similar significations. He defines "to make good" as-(1st) to fulfil; to accomplish; as, to make good one's word, promise, or engagement, -(2nd) to make compensation for: to supply an equivalent; as to make good a loss or damage. The way in which the expression is used in any particular clause, must be gathered from a reference to the circumstances under which it is used, the resgestæ of the case; from the context; from the subject matter of Here the subject matter of the contract is the contract. labour and labour only. It is what the planter goes far to seek and runs great risk to obtain. It is what the labourer comes far for and undergoes many privations to procure. A sudden withdrawal of his labour might place the planter in a position of ruin; were it permitted, he would be at the mercy of those he has risked so much to obtain. It is, therefore, of the highest probability that expressions such as these would be used by both parties rather in the sense of making good in kind, than in making good by way of compensation in money, a form of compensation which, indeed, would practically leave the planter without remedy.

Does the context support this interpretation? I think it does. If to make good a loss of money in this clause means, as it olearly does, to make it good in money, upon what reasoning is the expression to make good loss of labour to be read as implying such loss is not to be made good in labour? There is nothing in the character of labour which in itself renders its restoration in kind difficult or impracticable. There is nothing which I can see in the language of the clause which shows any intention that for such a loss the compensation was to be in money. It might indeed be said that as the 1st clause of the contract so clearly expresses an event under which the coolies are to work beyond the two years, viz., the nonpayment of the advance, a less definite expression in another part of the contract must have a less definite construction. But I think little can be based upon such an argument. Under clause 1 of the contract, if two-thirds of the gang died, the remaining third would still have to work, till the advance to the whole gang had been paid off. Under clause 3, it would not be so. clause clearly defines in what cases the labourer would have to make good the loss of labour or of money occasioned to his employers. Death is not one of these cases, and this may be the reason (if any search for a reason is necessary) why the first clause, which provides for all cases, expresses in more decisive terms the liability of the labourers to work out their lost days.

This being the view which I take of the construction of the contract. -- How is the Act to be applied to a breach of its provisions? In England we have not, that I am aware of, any machinery for compelling a return to labour and the employer is left generally to his civil remedy, or to obtaining a fine through the agency of a Magistrate. But the Indian Act XIII of 1859 seems framed for the purpose of meeting this very evil in cases where advances have been made. Its preamble recites both the evil and the inefficiency of the remedy by Civil suit. I cannot doubt but, that, if the construction now put upon the term "to make good " is correct, the Magistrate ought to have ordered both these classes of men to return to their work. I have not come to this conclusion upon the question of construction without some degree of doubt, and, looking at the hardships which a stringent enforcement of all the terms of this contract might inflict upon the labourers of the Appellant, I could wish that there was an opportunity of the Respondents taking the opinion of the Appellate Court. As I said, however, in the earlier part of this judgment, the hardships of the case have really no bearing upon the immediate decision. It is a case of construction of the terms used by the parties and of construction only.

I may add, although the observation is not strictly relevant to the points now determined, that the labourers will receive their 12 cents a day during the further period of their labour; and it may be well, that, all situated in the position of the Appellant, should understand that a lesser payment than this amount at any time would not improbably entitle the whole body of their labourers to vacate their contract. These joint and several contracts are capable of a very inhumane application, even to the extent of making one man in a hundred work out the defaults of 99 absconders. I am glad to find the Appellant has intimated that he only presses in this case for an order making each man liable to work out the days he himself has made default in, and I trust this will be a general practice; but, had he chosen to press his claim further he would probably have been successful. The case must be remitted to the Magistrate to order the Respondents:

- 1. To work up the 6 days.
- 2. To work up the loss of labour occasioned to the planter by their default.



FULL COURT OF APPEAL. \*

Before Sir Thomas Sidgreaves, Chief Justice, & Mr Justice George Phillippo, Acting Judge of Penang.

IN THE CAUSE BETWEEN

Haleemah, Widow of Che Ahman deceased, and Pachee and Zeinab, Infants-Plaintiffs.

and

F. R. Bradford, Registrar of the Supreme Court, as Administrator of the said Che Ahman deceased, and Kanjah daughter of Che Ahman—Defendants.

The Indian Act XX of 1837, which has altered real property to chattels real only refers to the transmission of such property but does not alter the nature of it.

A Mohamedan husband takes no interest in his wife's freehold property during the lifetime of his wife or after her decease by virtue of the coverture.

Penang Gazette, 24th June, 1876. -

#### JUDGMENT.

In this matter two questions were submitted for our consideration, 1st.—Whether the freehold property of a wife predeceases her husband and dies intestate, is to be held to have been chattels real, during the lifetime of the wife, under Section I of the Indian Act XX of 1867 and as if vested in her husband, during the coverture jure uxoris, 2nd.—If so whether there is an exemption in the case of a Mohamedan woman.

We consider, that in the case of a Christian marriage in these Settlements, the law upon the subject is precisely the same as in England, subject as regards the wife's real property to the modification introduced by section I of Act XX of 1837 which is as follows: "It is hereby enacted, that from the 1st day of October 1837, all immoveable property situate with the jurisdiction of the Court of Judicature of Prince of Wales Island, Singapore and Malacca shall as far as regards the transmission of such property on the death and intestacy of any person having a beneficial interest in the same, or by the last will of any such person, be taken to be, and to have been of the nature of chattels real and not of freehold."

The effect of that Act has been, that as regards the transmission of immoveable property, on the death and intestacy of any person having benefical interest in the same or by the last will of such person, it shall be taken to be and to have been of the nature of chattels real, we consider this provision to relate to the transmission of such property only and that it does not affect or alter the nature of such property, either before or after the death of such person. The answer to the first question therefore will be, that in case of such a marriage as hereinbefore mentioned, the freehold property of a wife dying before her husband and intestate, is to be held to have been chattels real for the purposes of transmission only, during the lifetime of the wife. It does not, however, have the effect of relating back and altering the nature of the husband's interest in his wife's freehold estate before her death, and therefore such freehold property cannot be considered, as having been vested in the same way as chattels 'real

<sup>\*</sup> By the Act, the Court is to consist of four Judges, or not fewer than three. The Solicitor Genéral, one of the appointed Judges, who sat in the other cases, declined to sit in this, as he had been Counsel for the case previous. The Court delivered the judgment by consent of Counsel on both sides and held it to be binding.

8. L.

might have been in her husband, during the coverture jure uxoris; the husband therefore will have to take out administration to such property in the usual course.

Consistently with the cases referred to in the argument reported in Woods' Oriental cases we have no difficulty in deciding that the English law based entirely upon the Christian marriage is wholly inapplicable to the relationship existing between the sexes by virtue of a Mohamedan marriage. For some purposes a Mohamedan marriage is recognized as a valid marriage by our Courts but the nature of the contract is essentially different from that entered into by Christians, and in accordance with the cases already decided that a husband who contracts a marriage which he is at liberty to dissolve at pleasure, takes no interest in his wife's estate. We hold that under a Mohamedan marriage the husband takes no interest in her freehold property during the lifetime of the wife or after her decease by virtue of the coverture. Judgment therefore in favour of the Defendants will be affirmed.

Note.—Further particulars regarding Mchamedan married womens property, see cases at p. 263, 260 & 275. Of marriages and divorces among the Mohamedans, Hindoos and Chinese, see cases at p. 81, 280, 270, 282, 167, & 314.



### 1st March 1877.

BEFORE HIS HONOR T. T. FORD, Acting Chief Justice.

LIM AH YONG vs. KHOO KHAY CHAN.

The Indian Act XX of 1837 having altered real estate to chattels real for the purposes of transmission, on the death and intestacy or testacy of the owner thereof, has done away with the legal estate of a devisee and transferred it to the Administrator or Executor as the case may be. Such devisee cannot therefore without the assent of, or a conveyance to him of the property devised, from, the Executor, maintain an action of ejectment for it.

This was an action of ejectment to recover possession of certain property in Beach Street alleged to belong to one Lim Kong Wah deceased, who died in 1843. The plaintiff claimed as devisee under the Will of the the said Lim Kong Wah. The defendant was sued as the occupant, but by an order of Court one Ong Cheng Neo, who claimed to be interested in these premises under the Will of Oh Yeo Neo deceased, the widow of the said Lim Kong Wah, was permitted to intervene and defend the action in the name of the defendant, but as Executor of the said Oh Yeo Neo. The defendant was one of the Exceutors of the said Oh Yeo Neo, but did not appear willing

to defend the action. Oh Yeo Neo was during her lifetime the Executrix of the said Lim Kong Wah, and in 1844 obtained Probate of his Will, which was dated the 19th September 1843. The Will was written in Chinese characters and it was alleged by the plaintiff that the residuary clause, under which he claimed, was wrongly translated. The case was first called on for hearing on the 20th March 1876, but was allowed to stand over, in order that an application should be made to the Ecclesiastical Court for a rectification of the translation. An application was made some months after, when the Court ordered that the new translation be filed and kept with the records, but not to be attached to the Probate. On the 22nd February 1877, the case was again called on, the Court after a day or two's hearing, finally disposed of it on this day.

The plaintiff gave evidence of the above facts and of the seisen of the testator Lim Kong Wah and of his relationship to the deceased, also of his being the person referred to by the testator in his Will as his son "Yong" or "Mah Yong" and of the wrong translation of the Will by the officer of the Ecclesiastical Court in 1844, at the time the Probate was granted and put in a correct translation thereof. By the translation the rest and residue of the testator's property was devised by him to his widow Oh Yeo Neo for life with remainder to his "sons and grandsons."

The defendant Ong Cheng Neo did not go into any evidence, but alleged that the premises in question, were the property of the firm of Ee Ho, in which the testator was the senior partner and that the testator never devised them by his Will at all, but after his death they were sold by the surviving partners to Oh Yeo Neo, under whose Will she claimed them.

Mr. Van Someren, on behalf of Ong Cheng Neo and in the name of the defendant, as such Executor as aforesaid, asked for judgment on the above facts, among others he maintained—1st, that the plaintiff could not succeed, as he was not the sole person entitled to the remainder under the residuary clause, it was given to "sons and grandsons" of the testator. The plaintiff ought to have proved the exact portion he was entitled to, not having done so, there was nothing on which the Court could ground a judgment in his favour, he not being owner of the whole and cited Doe D. Hellyer vs. King. 20 L. J. Ex.(N. S.) 301, Alcock vs. Wilshaw, 29 L. J. Q. B. (N. S.) 143, and Blake vs. Done, 31 L. J. Ex. (N. S.) 100—and 2ndly, he maintained that the plaintiff

could not maintain this action, as he had not the legal estate which was absolutely necessary-Roscoe's N. P. Evid. (13th ed.) 974 and must succeed on the strength of his own title and not on the weakness of the defendants. Ibid. 972-that the plaintiff had not the legal title, that he relied on the Indian Act XX of 1837 Ses. 1 & 3. and submitted this was a case of transmission and the legal estate was in the Executrix of the testator during her lifetime, 1 Wm. on Exrs. (4th ed.) 559, but she being dead and having appointed the defendant her Executor, he now had the legal estate as the derivative Executor and cited Broom's Commentaries (3rd ed.) 607. He admitted that devisees of leaseholds, although chattels real, could maintain ejectment but only in those cases in which they had the assent of the Executor. Roscoe's N. P. 1026 (13th ed.) and the cases there cited. This assent he submitted had not been proved, in fact the defendant had by his acts shewn, he did not mean to give it, and it could not be inferred against his own acts.

THE JUDGE referred to the case of Haleemah vs. Bradford decided by the Court of Appeal in June 1876, which limited the Act to cases of transmission, and decided that the Act did not change the nature of the property but only the channel of devolution.

Mr. Clarke for the plaintiff was heard contra—he submitted the Court would amend by making the sons of the plaintiff, also plaintiffs, who he said were the next interested, which is the course the English Courts would have taken, and referred to Blake vs. Done. (Supra.)

THE JUDGE, on the ground that this being clearly a case of transmission within the Act and that the plaintiff not having the legal estate because of the Act, allowed him to take a

Nonsuit



## PENANG.

22nd February, 1872.

BEFORE SIR WM. HACKETT, KNT., Judge of Penang.
REG. vs. BABOO and another.

In an Indictment under Act I of 1849, it is sufficient to allege that the Prisoner is a "British subject" without stating that he has resided here for the period of, six months.

The Prisoners were indicted for dealing in slaves, in the Malayan Territory of Quedah. They were indicted on the Act relating to slavery, assisted by Act I of 1849; by which a person, who has committed any crime abroad may be tried here, if he has resided here for the period of six months, either before or after committing such crime. The Indictment stated, the Prisoners were "British subjects."

Mr. Rodyk, for the prisoners, moved to quash the Indictment, as although it alleged the crime to have been committed abroad, it omitted to state that the prisoners had resided here for the period of six months, as required by Act I of 1849; and that the words "British subjects" were insufficient.

The Solicitor General-contra.

THE COURT HELD that the Indictment was sufficient and refused to quash it.

The Jury sometime after, returned a verdict of

" Guilty."

Compiled and arranged by S. LEICESTER.

Printed at the Commercial Press, by HEAP LEE & Co.,

PENANG.

1877.

## SINGAPORE

22nd July 1834.

# BEFORE SIR B. H. MALKIN, RECORDER. Sally Sassoon, vs. R. F. Wingrove, Esq., Sheriff.

A mortgage for a term of years does not require a lease for a year to support it. A mortgage to be good need not be registered, as the Regulations as to registration is illegal, the Stat: 53 Geo. 3. c. 155., not authorizing such Regulations. If land mortgaged be taken in execution by the Sheriff, the Mortgagee has a right to eject the purchaser from the Sheriff from such land, and to recover its profits during the period of its unlawful occupation.

### JUDGMENT.

This was an action against the Sheriff for seizing under a Writ of Sequestration against Lee King, and selling lands mortgaged by him to the Plaintiff: and the only question in the case was as to the validity of the mortgage.

The mortgage was not impeached as fraudulent or colourable; but it was said to be invalid on two grounds; first, as purporting to be a release in fee and therefore invalid without a lease for a year to support it; and secondly, for want of registry, according to Government Regulation of 1830.

The first objection is clearly invalid. The mortgage has some words belonging to a conveyance in fee: but it is in fact, of an Estate for years. The necessity of the prior lease in the case of a conveyance really in fee arises only out of the rule of law requiring livery of seisin, in the case of transfer of an estate of freehold in possession: and as that rule does not apply to a lease for years, any conveyance shewing an intention to pass the immediate interest and possession and containing words adequate to do so, is sufficient. The mortgage indeed is formal; but it is valid to pass the whole interest subject to the proviso.

On the second point, it is not contended for the Plaintiff that the mortgage was registered in compliance with the Regulation, but it is said that the Regulation is illegal, as not being within the authority given by the 53 Geo. 3. C. 155. Secs. 98 & 99, to the Government to pass regulations: and this on two grounds; first, as not being a regulation imposing a duty or tax; and secondly, because Singapore is not named in the Statute.

On the latter of these arguments, it is not necessary to express any judgment, as I am clearly of opinion that the former is well founded. If the question did turn upon the second, I should feel it necessary to examine very minutely into the provisions of the Treaties, Statutes and Charter affecting the relations of Singapore to the Government and to Prince of Wales Island, before I came

to the conclusion that so great a mistake had been committed, as that of failing to extend the provisions of 53 Geo. 3., to a place where they were undoubtedly just as much required as at Prince of Wales Island.

But it seems to me to admit of no question that the Regulation is not within the Statute, as not being one for the imposition of duties and taxes, and it is not even contended that it can be sunported except on the authority of that Statute on the footing of which also it clearly appears by its title and preamble to be passed. Now I think it so quite clear that the real object of this Regulation was to regulate the tenure and transfer of land, and not to impose a duty on it, though, for the purpose of defraying the expences of the office to be constituted for its enforcement, certain fees were imposed and to an amount which would probably make it profitable to the Government. The main question seems to be which was the primary and which the secondary object. It the object was the imposition of the duties, the power of the 99th Section of the Statute to make tules and regulations with respect to the duties and taxes imposed, might by possibility extend to the imposition of the complicated machinery introduced; though this would in my judgment be a very strong construction to put on the words of the Statute. But if the object was the regulation of the lands, the assertion of the Company's title, the registry of titles, for the sake of the public benefits to be derived from such registry itself (a most important object in my judgment every where, and especially here, but which cannot be effected, except by some legal authority) (a) or even the better security of the Company's rents, which though revenue, are neither duty nor tax, then it seems to me that the establishment of a rate of fees was only subordinate and incidental to the main object, that the Government having no power to legislate for the main object, the Regulation is illegal, and that it is not prevented from being so by the oircumstance that some profit may have been incidentally realized. out of the fees established for another purpose.

It would be useless to go minutely into the details of the Regulation, every page of which, I think proves that the latter is its real character. Its title shews it conclusively. So does its preamble, and even in the two sections 8 and 9, in which alone the payments which can in any degree give it the character of a tax regulation, are imposed, they are expressly declared to be levied in order to meet the incidental charges, and are spoken of as fees, a sort of payment perfectly distinct from a duty or a tax: so much

<sup>. (</sup>a) Broom's Legal Maxims p. 4.

so, that if it were not for the 11th Section providing that they shall be carried to the credit of Government, there would be nothing in the terms of their imposition even to make them available to public purposes.

Many of the purposes of the Regulation might, notwithstanding its illegality as a law, be secured by making them matters of condition and stipulation in the leases granted by the Government. I do not think, however, that in any case it could be inferred that the leases were subjected to those conditions, unless made so by express statement or direct reference to the Regulation itself. at all events no such stipulations could exist in the original lease of the property in question, which is annexed to the mortgage, and bears date long before the passing of the Regulation. In any case also, as between third parties, such stipulations would probably be ineffectual however available they might be to secure the interests of the Government. If the mortgage is not illegal, the mortgagor would be bound by it, though he would have acted in contravention of his covenant in making it: and if he would be bound by it. his creditors claiming under him and standing in his place, would be bound also. No one could enforce the stipulations introduced for the benefit of the Government, except the Government itself, or persons claiming under them by title paramount to that of the lessees. The case would just be like that of a condition in a lease not to assign without licence, which has never been supposed to render an assignment made in contravention of it void except as against the assignor or his assigns. A mere covenant would not make it void, even as against them: but would only give them a remedy against the covenanter.

The only remaining question is, as to the amount of damages; and as I understand that the parties, to prevent further litigation, are willing to agree that the whole amount of substantial damage shall be recovered in this action, the plaintiff consenting to secure the purchaser under the execution in his title, I need not discuss it in detail. It would seem to me independently of such agreement, that the Plaintiff was entitled only to nominal damages, as he retains the right of treating the sale as null and void, and reserving the possession of the land and the mesne profits of it since the sale, for the purchaser, who would have to seek his remedy against the Sheriff. As however it is agreed that the Sheriff shall make the necessary compensation at once, the only question is up to what time the damages should be computed. It was suggested that the Plaintiff had been himself in fault, having left no one to act for him, and ought not therefore to recover more than

his principal and the interest due at the time of the sale. I do not see the force of the argument: the seizure took place with notice of the mortgage, and under a claim of right arising out of the Regulation, and in all probability it would not have been the less enforced, even if the plaintiff had been here in person to assert his claim. Besides, if the judgment is now given for nominal damages, the Plaintiff if he proceeded against the purchaser would clearly be entitled to recover not merely the possession of the land, but its profits during the period of its unlawful occupation (a): and the Sheriff, if liable at all to the purchaser would be liable to the extent of the injury which he had suffered. I see therefore no reason to deprive the Plaintiff of interest. The Sheriff, I believe, is indemnified by the execution creditor, and it is no hardship that he should pay interest having had the use of the money.

The judgment therefore will be entered for the Plaintiff for one dollar damages, and costs, to be increased to 2490 Dollars on the Plaintiff's executing a conveyance of the land to the purchaser under the execution and his accepting it. In the event of any appeal by the Defendant, it is agreed that the only question raised, is to be as to the validity of the mortgage and that the judgment is not to be reversed on the ground that it ought to have been for nominal damages only. If the Plaintiff should refuse to execute, or the purchaser under the execution to accept a conveyance, then the judgment is to stand for nominal damages only, and the Plaintiff is to be allowed to file a Petition to appeal, on the ground that he ought to have recovered the full value of his mortgage, and to suspend all proceedings upon it, till he has brought an action to recover the possession of the land, and that case has been finally disposed of, on appeal or otherwise.

(a) See Doe D Hughes vs. Jones, 9 M. & W. 372.

31st December 1835.

## BEFORE SIR EDWARD J. GAMBIER, RECORDER.

Boustead and others vs. Clarke and others.

Trover for goods by the consignees against the ship owners.—Where the freighter of a vessel purchases goods from the plaintiffs and they by his order and on his account and risk consign them to the place of destination and agree to take a specified return cargo or failing that, Manilla Sugars at certain prices on the return of the vessel, or in 5 months—and sugars were shipped by the consignees to the plaintiffs on his account and the price debited against him—and in letters from him to the plaintiffs, he only recognizes their right to hold them as security for their claims—& they take no steps during the voyage to treat them as their own—HELD that the freighter must be considered the owner

of the sugars, and that they came into the ship owners' hands as his, and that they had therefore a lien upon the sugars, for the gross amount of freight due to them under the Charter Party.

## JUDGMENT.

This is an Action of Trover brought to recover the value of 977 bage of Sugar shipped at Manila on board the Elizabeth, and consigned to the Plaintiffs, Messrs. Boustead Schwabe and Co. at Singapore. The Elizabeth, or at least a portion of that vessel, appears to have been chartered by Mr. McKertich Moses, for a voyage from Singapore to Borneo and Manila and back again .--On her return to this port she was laden with the Sugars in question, which are retained by the Defendants, the owners of the Elizabeth, on the alleged ground that the cargo is the property of Mr. Moses, and that they have a lien upon it, for the amount of freight due under the Charter Party. The questions in this case are; first, whether at the time of the Elizabeth's arrival at Singapore, Mr. Moses had that species of property in the Sugars which made them subject to any lien on the part of the Defendants; and secondly, supposing the Sugars to be, to such extent, the property of Mr. Moses; whether the Defendants so far retained possession of the vessel during the voyage as to have a legal right to enforce their claim by the detention of the goods.

The first question is the only one which has any difficulty about it, for I am clearly of opinion, with regard to the second point, that the Defendants had so far retained possession of the vessel during the voyage as to be entitled to insist upon their-lien. The provision in the Charter Party by which the Owners bind themselves to receive into the vessel at Mr. Moses's order here, in Barneo and Manila a full cargo of lawful merchandise, places this matter beyond all dispute.

With regard to the first question, how far the Sugars, at the time of the *Elizabeth's* arrival at the port of *Singapore*, were the property of *Mr. Moses*, the evidence is as follows:—

On the 22nd December 1834, certain goods called Domestics were sold by the Plaintiffs to Mr. Moses. He agreed to order the Plaintiffs to ship them to Paterson and Co. at Manila on his account and risk, and effect insurance, ordering the returns in 300 Piculs of Mother of Pearl Shells and 500 Buffalo Hides which the Plaintiffs agreed to take at specified prices on the return of the Elizabeth from Manila, or in five months: failing hides or shells, they were to be paid in Manila Sugars at prices stated in this memorandum of agreement.—It would seem from this agreement that the plaintiffs were to be paid by the returns shipped on

board the Elizabeth but for the stipulation in the alternative that the payment should be received on the return of the Elizabeth or in five months. Looking to the Charter Party which provides that if the Elizabeth should be beyond five months on the voyage a further sum was to be paid by Mr. Moses, this clause in the Plaintiffs' agreement with Mr. Moses seems to provide against this event, and to contemplate their being paid, in that event, by other means than by the home-ward or return cargo. The consequence is, that the return cargo of the Elizabeth would not absolutely and under all circumstances, be appropriated to the payment of the Plaintiffs.

By the letter of Messrs. Paterson and Co. to Mr. Moses dated 2nd June 1835, and by the statement of accounts between them made upon the same day, it appears that the Sugars sent to Singapore in the Elizabeth were shipped on his account and that he was debited with the price of them.

In the letter addressed by Mr. Moses to the Plaintiff, and bearing date the 22nd December 1834, after stating the particulars both of the outward cargo and of the returns, there is this passage: "It is understood that these transactions are altogether on my account and risk, and that you are not to charge any commission for managing them."—In the P. S. "It is clearly understood that Messrs. Boustead Schwabe and Co. are to have complete control over these goods, and to hold the returns for the same as security for their claims against me, until such claims shall be fully satisfied."

In another letter, or order, dated 23rd December 1834, he speaks of the returns in the following manner: "which produce you are at liberty to hold as security for any claims you have or may have upon me."

The fair result of all this evidence, in my opinion is, that the ownership of the goods in question was originally vested in Mr. Moses, that it remained in him, and was intended so to remain and that the only right that the Plaintiffs could claim was that of holding them as a security for their claims. The Plaintiffs appear to have taken no steps, while the ship was on her voyage to treat these goods as their own. Mr. Moses indeed says that he insured on their account, but they did not pay the premiums and the underwriters look to Mr. Moses for the payment of them.

Still it may be a question whether, admitting the Sugars to be the property of Mr. Moses, possession of them was still so far vested in the Plaintiffs under the previous agreement and by the consignment as to give them a paramount claim to that of the Ship Owners. Now in order to determine this question, we ought to look to the conduct of the party who actually shipped the goods. The Shippers, as appears by the Bill of Lading, were Messrs. Paterson & Co; they charge Mr. Moses for the goods and they state to him in their letter that they shipped them on his account. Messrs. Paterson therefore, having shipped them as the goods of Moses, they came into the possession of the Defendants as his goods; the mere consignment to the Plaintiffs would not be any notice of title, or imply with any certainty that they were the real owners of the goods.

The situation of the parties, then, being what I have described,— Mr. Moses continuing, in point of law, the owner of the cargo, and the Plaintiffs having only a right to hold the goods as a security for their advances, this case, must, I think, be governed by that of Faith vs. E. I. Company, 4 B. and Ald. 630, the second point decided there being precisely that which arises in the case now before the Court. In that case, goods were purchased for a homeward cargo by a Firm in Calcutta on account of the Charterer. The Charterer was indebted to them and also to their agents, a Firm in London, who had made advances on the outward Cargo. The Goods so purchased were by the Bill of Lading consigned to the London House .- It was held nevertheless that, as between the owner of the ship and the London House, the goods were to be considered as the goods of the Charterer, and liable to the owner's lien on them for the freight due by the Charter Party. - In Abbot on Shipping, p. 178, the case of Faith vs. E. I. Company is referred to, and the following conclusion is drawn from it, that any assignment or pledge made by the Charterer does not deprive the ship owner of his right to detain the goods .--In Faith vs. E. I. Company the security or pledge was as much a prioa security as it is in this case. That appears therefore to be no obstacle to the exercise of the right of detention by the shipowner. I am of opinion, under the circumstances of this case, and upon the authority of the case which has been cited, that the Defendants are entitled to hold the goods in question as a security for the gross amount of freight due to them under the Charter Party. The consequence is that the judgment of the Court must be for the Defendants.



## <sup>2</sup>5th january, 1836.

# BEFORE SIR EDWARD J. GAMBIEP, RECORDER. Brown & Others vs. Duncan.

A person who fits out an expedition for the sole purpose of seeking and saving property lost, and embarks his capital in the undertaking, and employs suitable and skilful persons for carrying it into execution, and charters and equips vessels with no other object in view, with no cargo on board, and without any ulterior destination, stands in a very different situation from the ordinary owners of vessels, which happen in the course of their voyage, to meet a vessel in distress and render assistance.

SEMBLE.—Fifty per cent on such outlay or advance of capital under such circumstances, is a fair and reasonable sum for compensation; and this amount of outlay, is to be made out of all sums paid for the affreightment, and outfit of the vessels employed in the service, and also, of all such further sums as would have been lost to such person, supposing none of the property lost be recovered.

## JUDGMENT.

This is a suit instituted by the owners of an American vessel, called the New Jersey, which, in the course of her vayage from Gibraltar to Canton with a valuable cago on board, consisting principally of Quicksilver and Lead, was wrecked upon the Louisa Shoal in the China Sea in the month of November 1833. there remained as a derelict, and the Captain, who appears to have found his way to Singapore after the loss occurred, although amply provided with funds, took no actual measures for recovering any part of the cargo. In the early part of the year 1834, three vessels were chartered and fitted out by different parties, merchants at Singapore, and were furnished with skilful persons and divers, for the purpose of attempting to recover the property lost in the New Jersey. Two of these vessels, the Madeline and the Reliance appear to have taken their departure at the end of January or beginning of February 1834, during the height of the N. E. monsoon. The Louisa Shoal is 800 miles from Singapore; and the service upon which these ships were employed was considered by competent judges not only a dangerous but a desperate one. The Reliance was lost upon the shoal; the Madeline returned, after a successful adventure, with Quicksilver and Lead, estimated at about 24,000 or 25,000 Spanish Dollars. The third vessel, the Lucile, sailed from Singapore early in April 1834 and recovered property from the wreck to the value of about 7.200 Spanish Dollars. There can be no doubt as to the meritorious nature of the services rendered by all parties engaged in these adventures, and a large share of the credit acquired by the successful result of the expeditions is due to those enterprising persons who furnished the means of prosecuting them to such an issue,

and without whose spontaneous assistance, as far as appears from these proceedings, no part of the property would have been recovered.

The Defendant was interested in the Madeline and the Lucile. to the extent of 1/10th, of the adventure by the former vessel. and 9/20ths, of that by the latter. He received, in kind, his due share of the property recovered, and bore his proper propertion of the expenses and outgoings. Part of the disbursements were for the remaneration of the Master and crew of each of the ships engaged in the business, and for that of the superintendents and divers who were more immediately concerned in raising and recovering the cargo. The services of all these persons have been recompensed according to a scale agreed upon when the expeditions were sent out, and no further claim for salvage is exhibited by them or on their behalf. A claim for salvage is however made by the Defendant, and his right to call for remuneration is not contested by the Plaintiffs: the only question, as I understand, between the parties being as to the amount which he is entitled to receive. Not being able to adjust this matter between themselves, they are now before the Court in its equitable capacity, the Plaintiffs having filed a Bill of Discovery and for an Account; the Defendant having put in his Answer with an Account tweked to it, and evidence having been adduced on the one side and on the other. In his first Answer, the Defendant appears to admit the possibility of some balance being paid over to the Plaintiffs after a just and equitable compensation for himself. In his further Answer, put in after exceptions to the former one, he claims for himself all the remaining balance of the property saved. balance, according to his amended Account, is 2,771 Spanish Dollars and 46 cents

The claim of the Defendant to compensation in the nature of salvage resting upon the ground of his interest in the adventure, it is necessary to fix and ascertain; first, the principle upon which compensation should be given to a party sustaining this character; and secondly, what, under the circumstances here disclosed, would be its just and proper amount.

I hardly think that it would satisfy the Defendant's expectations, if this case were treated as the case of mere owner, who by the employment of his vessel in a salvage service has suffered damage and inconvenience—for a party in that situation would scarce obtain more from any English Court of Justice than the mere amount of such loss and damage and this upon the ground that the principal ingredient in salvage remuneration—namely, the

consideration of the personal exertions, the personal skill, the personal danger of the party-is found wholly wanting in a case of this description. "It is a first principle" says Mr. Holt in his Treatise on Shipping p. 539, "that in the case of a vessel saved, the master and crew are strictly the only salvors. The owners claim only under the equitable consideration of the Court for the risk of their vessel &c , the Court being not disposed to allow their claim to any great amount." And he refers to the case of the Wight, 5 Robinson, Adm. Rep. 215.—"The general rule," said Lord Stowell in the case of the Vine, 2 Haggard's Admiralty R-p. 2. "is that a party not actually occupied in effecting a salvage, is not entitled to share in a salvage remuneration. The exception to this rule, that not unfrequently occurs, is in favour of owners of vessels which in rendering assistance have either been diverted from their proper employment or have experienced a special mischief, occasioning to the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed." 'Such compensation was awarded in the case of the Salacia, 2 Hagg- Adm. Rep. 262, though, I think, it appears that the sum there given to the owners was only that which was estimated as the amount of actual damage sustained by them in consequence of the loss of the fishing season. And in the case of the Jane, 2 Hagg, Adm. Rep. 338, the claim of the owners to a share of the compensation was admitted by the Court. on the ground of the detention of their vessel, and the consequential risk and expenses, though the Court said that the claim of owners generally was very slight, unless, from the circumstances of the case, their property became exposed to danger, or they incurred some real loss or inconvinience.

The principle therefore upon which the absent owners are compensated for the salvage services which their vessels may have performed, would not prove a very productive source of profit to the defendant and those who engaged with him in the adventure. But I am disposed to think that the case now before the Court has circumstances belonging to it, and possesses peculiar merits, which are not found in ordinary cases of salvage. It usually happens the service is rendered by a vessel that is employed for other purposes, and with other objects,—and not by one that is sent to sea expressly and solely with a view to the recovery and preservation of the property that is either lost or in a state of jeopardy. The ordinary case is that of a ship which in course of her voyage, either upon the public services, or with a cargo on board, or when in quest of one, falls in with a vessel in distress, and ex-

pends the labour of the crew and the time which may be considered as the property of the owners, in rescuing her from the peril in which she is found. The chief actors and prime movers, under these circumstances, are the master and crew, whose duty it is (and that duty is fortunately stimulated by motives of interest) to afford assistance in all cases of maritime distress. There is no merit in the owners-no meritorious services on their parts-no spontaneous exertions by them for the relief of the suffering party. The law therefore mete- out compensation to them with a sparing, and I may almost say a niggardly hand. But those who fit out an expedition for the sole purpose of seeking and saving that which was lost; those who embark their capital in the undertaking and employ suitable and skilful persons for carrying it into execution; those who charter and equip vessels with no other object in view; with no cargo on board, and without any ulterior destination, stand in a very different situation from the ordinary owners whose case I have alluded to; and to apply the same rule of compensation to them would, I think; be illiberal, impolitic and unjust.

I have certainly found no case in the books which resembles in its circumstances that of the Defendant and those who acted with him, and I know of no express authority to which I can look as a guide for my decision. In a case so new in its kind, general principles must be resorted to; and I think the very first principles of the Law of salvage furnishes a test by which the question of compensation may be determined. The very ground work, on which salvage compensation in general rests, is the stimulus which it affords to the exertions, which are necessary for saving property and lives that are jeoparded by the perils of the seas. As this remuneration, in order to be a sufficient inducement to act with effect, must, in cases where bodily exertions are required, be something more than a mere compensation for the labour bestowed, so, it seems to be reasonable that, in cases where capital is the primary instrument employed, it should be something beyond a bare return of capital with a mere ordinary profit upon the use of it. I think therefore that I shall not be departing from the true principles upon which all questions of salvage compensation have been decided by saying that the remuneration, in the present case, ought to be large and liberal; that is to say, that the profit, upon the capital employed should considerably exceed the profit upon an ordinary commercial speculation, bearing perhaps something of the same proportion to the usual every day profits which the interest on a Respondentia Bond bears to that upon a common obligatory instrument.

Such are, I think, the general principles which are applicable to cases like the present. The situation of the parties who thus advance their money without engaging personally in the adventure, is so different from that of persons who are actively employed upon the spot that it would be wrong, in point of principle, to remunerate them both in one and the same manner. The actual salvors may with great propriety be rewarded in some proportion to the amount of property recovered, because that mode of remuneration stimulates them to greater exertions and induces them to recover as much as possible. The natural stimulus to the emplayment of capital is the return which it affords, and I am therefore of opinion not only that it is unnecessary to have recourse to any other mode of compensation but that a per centage upon the outlay is the best and wisest and most appropriate method that can be devised for the purpose. The amount of per centage must depend on a variety of considerations—the principal of which are the nature and extent of the risk incurred, and the successful issue of the adventure. A different mode of adjusting the claim of the Defendant has indeed been suggested by the Plaintiffs themselves and has, I understand, been adopted in the arrangement of other claims—that of allowing to the parties a certain proportion of the net proceeds remaining in their hands. And I find that on the 4th March 1835, before these proceedings were instituted, an offer was made on the part of the Plaintiffs, that 65 per cent should be allowed to the Defendant out of the net proceeds of his portion of the property saved, such sums only being charged for expenses as had been actually paid. Considering the amount of salvage already, in substance and effect, paid to real salvors. I think this offer was a very liberal one on the part of the Plaintiffs, and the sum which it would have secured to the Defendant would, according to my judgment, and the calculation which I have made, afford a most ample return for the capital laid out-far more indeed, than I think he is entitled to expect. I have already however given my reasons for proceeding upon a different principle.

The Defendant appears to have agreed with the Plaintiffs in regarding the net proceeds as the fund from which his remuneration should be drawn; but he differs widely from them as to the amount and measure of his reward. His own standard of remuneration—taking the lion's share—is one certainly of a novel and extraordinary kind, and it appears to me to involve a contradiction in terms that he claims this as a compensation by way of salvage; for salvage being the consideration paid by owners of property lost

or endangered for the benefit accruing to them from its recovery or rescue, it seems to me that neither the name nor the thing itself can exist when nothing is recovered or restored. The Defendant proposes that the proportion which he has in his possession should accrue, not to the benefit of the owners, but wholly and exclusively to his own. He must intend to mete out the same equity to others as to himself—and therefore his proportion must necessarily imply that all the other salvors should retain each his own division of the spoil, and that no part of the recovered property should be restored to the real owners. This, I think, can scarcely be deemed the proper rate or standard of remuneration.

Upon the whole, I am of opinion that in this case, a just, proper and sufficient compensation will be made to the Defendant for his share in the enterprize if I give him 50 per cent upon his real outlay, or advance of capital. This, I think, will amply repay him for all the trouble as well as all the risk which can be fairly said to have flowed from his undertaking; and it must not be forgotten that he has derived some further advantage, from having held the proceeds of this property for so considerable a period in his

hands.

The amount of capital embarked in these adventures by the Defendant, blending the two transactions, by the Madeline and Lucile into one account, will be made up of all sums paid for the affreightment and outfit of the vessels employed in the service, and also of all such further sums as would have been lost to the Defendant, supposing no property have been recovered from the wreck. In order, therefore, to ascertain the amount of capital laid out. I deduct from the Defendant's Account of Expenses incurred. the following sums; first, Spanish Dollars 501-86, the portion of the proceeds which were paid to Mr. Melany and the Captain and crew of the Madeline; secondly, Spanish Dollars 307-83, the amount of per centage paid to Mr. Melany, Mr. Timms, the Captain, and crew of the Lucile; and thirdly, Spanish Dollars 90. which evidently form part of the per centage (5 per cent) paid to the ten divers. According to the evidence of Mr. Crane this per centage should be taken on Spanish Dollars 7231-86, and the Defendant's share would be about Spanish Dollars 162. Deducting however, such sums only as clearly appear in the account to have been paid out of the proceeds of the property saved, and which make together Sp. Drs. 899-69 the remainder, Sp. Drs. 2,249-85 will be the amount of the Defendant's outlay, and fifty per cent on that sum will be Spanish Dollars 1.124-92. This is the sum which I award to the Defendant, and which is therefore to be taken from the balance of the Defendant's account.

The question of Costs is one upon which I can entertain no doubt whatever, it being clear to me that all the expenses of this suit, on both sides, would have been avoided if the Defendant had accepted the offer of the Plaintiffs made in March 1835. That offer was, in my opinion, a most handsome and liberal one: I can see no good reason for its having been refused. It is indeed alleged that it was clogged with a condition that the accounts should be sworn to before a Magistrate, and that this between merchant, and merchant, who ought to be satisfied with the production of the ordinary mercantile documents, was an unusual and unbecoming demand. But I think it should be borne in mind that this was not a negociation conducted by the Plaintiffs themselves, who reside in America, but by an Agent whose duty it was not to sacrifice the interest of his principals to any refined notions of mercantile etiquette. And it must be confessed that if no other documentary evidence was intended to be submitted to his inspection than that which has been produced for the information of the Court, he would have been provided with but very slender materials for furnishing a report to his employers.

The decree of the Court will be, that the Defendant be allowed to retain of the balance in his hands, the sum which I have mentioned, as a compensation to him in the nature of salvage, and that the remainder be paid over to the Plaintiffs with their costs

of suit.

# 22nd February, 1836.

# BEFORE SIR EDWARD J. GAMBIER, RECORDER.

Brown & others vs. Hay.

An agreement between a person who advances money on an adventure to save property and the salvors of such property, that the latter should, in consideration of their receiving a certain allowance from the former, assign and transfer to the former, all compensation they may be entitled to for such salvage, cannot be enforced; the law will not bestow the fruits of labour upon those who have lent no hand to the work. Such an agreement will not be enforced, especially against the owners of the property, who were no parties to it, when in a suit for accounts of the adventure such person attempts to set off against such owners the amount paid by him to the salvors, and at the same time, claims the compensation of the salvors assigned and transferred to him as aforesaid.

#### JUDGMENT.

This case differs from the case of Brown vs. Duncan decided a short time ago in this Court, by reason of the introduction of certain allegations contained in the Supplemental Answer of the present Defendant, and of the proof, on the part of the plaintiffs of certain circumstances, which were not presented to the Court

upon the former occasion. It also differs from the case of Brown vs. Duncan, as arising out of the adventure of a single vessel, the Madeline, and not out of the separate adventures of the Madeline and another ship.

The present Defendant, in his Supplemental Answer, states that the Captain and crew of the Madeline, the divers and others actually employed in saving the property of the Plaintiffs, have, by Agreement, renounced and given up to the Defendant, the remainder or balance of such salvage compensation, as they would have been found by Law entitled to, if no such agreement had been made. The fact of this agreement having been entered into, does not appear to be put in issue by the Pleadings, and it must, I think, be taken as true. The Defendant further alleges that partly by virtue of this agreement and partly in consideration of the large sums by him laid out and expended in the recovery of the property, he claims all the remaining part of the proceeds. The proceeds he states at Spanish Dollars 2,572-23; the outgoings at Spanish Dollars 774-74.

The first question which the Defendant's allegations suggest for the consideration of the Court, is that of the legality of such an agreement. It may, I think, be doubted whether it is one that could be enforced either in equity or at law. But whether a stipulation of this nature would be strictly legal or not, is a question which is, in my opinion, unnecessary now to be determined. For, in this case, the proceedings are not between parties, of whom one has paid a valuable consideration as the price of certain contemplated advantages, and the other holds in his hands the realized fruits for which that consideration was paid. In such a case, if the general spirit and policy of the Law sanctioned the agreement on which the claim was based, it would be contrary to good faith and Equity to resist its performance. But the party who now advances the claim has no such Equity in his favour, and the Court must take care that he does not reap a benefit which it would be inequitable, on his part, to demand. To sanction the awarding of any surplus compensation in pursuance of this Agreement, the Court must be satisfied that there has been a proper and an adequate consideration for it. In the absence of all proofs upon the subject, the Court can only surmise what the consideration moving from the Defendant really was. I suppose the stipulation was this, that in consideration of the persons employed receiving certain remuneration in the shape of pay and wages, and a certain portion of the property recovered, which other portion was covenanted to be guaranteed to them, they should, on their part, well and truly pay over to the Defendant and his co-contractors all such further compensation and reward as should be bestowed upon them for the toil they were to undergo, the skill they were to exercise, and the dangers they were to encounter. Let us see how far the consideration here stated, is one which has passed from one of the contracting parties to the other-how far it stands as abstracted from the purse and pocket of the one, and transferred therefrom to the purse and pocket of the other. quite clear that the Defendant cannot, in Equity, hold the thing stipulated for and the price or consideration that was to be paid Now the presumption that arises from these pleadings, from the Answer of the Defendant, and from the Account which forms part of his answer, is that all that has worth or substance in the consideration paid to the actual salvors, is positively and absolutely retained by him, and is positively and absolutely refused to be resigned by him. He says that his account exhibits a just statement of the proceeds of the property and of the expenses by him therein incurred. Does it or does it not include the whole... in substance, of the valuable consideration paid to the actual salvors? I find among the outgoings, the freight paid for the Madeline—the amount paid to the Captain and crew and to Mr. Melany for their exertions in recovering the property—and also the amount paid to the divers who were sent to the wreck. These several amounts are retained by the Defendant as the expenses attendant upon the adventure. If therefore, the whole of what was really valuable in the consideration of the agreement is included in these outgoings, the case of the Defendant stands thus: He says "I claim the benefit of my agreement with the salvors. but I do not intend that the purchase of that benefit should cost me any thing: The price of the advantage for which I stipulated shall come out of the pocket of you, the Plaintiffs—the fruits and profits thereof shall find their way into mine. This surplus, which I claim, was bought by me partly by the good wages which I promised to them, and partly by a share of the property which might be saved-be so good as to put yourselves into my place and pay the salvors for me, and then do me the further kindness to put yourselves into their place and pay me for them. You will thus represent, in turn, each of the parties to the contract, not, to be sure, in any of the benefits to be derived from it, but amply and effectually in the endurance of all the burthens which it imposed." As far, therefore, as I can see, all the cost and damage are to be borne by the Plaintiffs; and I certainly have heard no argument. and none suggests itself to my mind, which induces me to think

that this would be a just or equitable mode of proceeding. I am therefore of opinion that the Defendant has not entitled himself, in Equity, to the enforcement of this contract-certainly not as against the Plaintiffs who were no parties to it. But it may be urged that in this mode of viewing the agreement, the Plaintiffa have obtained a positive advantage which they would not have acquired, had no such agreement been made-for that on the latter supposition, if the actual salvors had brought their claims into Court, a larger compensation would have been awarded by the Court than has been stipulated for by the agreement. Possibly this may be true. It may be true that, if no such contract were in existence, the Court, in its discretion, might adjudge a larger aggregate amount of reward than that specified in the agreement. But then the Court, reviewing the services which had really been performed, might have distributed that reward in a different mode from that pointed out by the Agreement, and might have taken a just and proper estimate of the merits of the various parties to the suit—the Captain and Crew—the Engineers and the Divers—or of particular individuals among them. That is the true and proper mode of deciding salvage claims, and the discretion of the Court would be properly exercised in adjudicating upon them. But if the parties who presented themselves to the Court were bound by an Agreement, which was to fetter the discretion of the Court, to control it in the exercise of its judgment, and to prevent its discriminating between the various merits of the persons engaged so as to reward them according to the true spirit of the decisions relating to salvage my answer to such applicants would be this: You address yourselves to the discretionary power of the Court, and yet debar it from using its own discretion: You ask the Court to put a value upon your labour and exertions, when you have already estimated their value yourselves. The Court will exercise a proper discretion on the subject; it will not value your services at a higher price than you have valued them yourselves; and unless it is compelled to do so by some stubborn rule of Law, it will not bestow the fruits of labour upon those who have lent no hand to the work-nor consent to defeat the very purposes for which a discretionary power is vested in itself; those purposes comprising not merely a general compensation in the aggregate to the entire body of salvors, but a discriminating encouragement and reward of individual merit.

Having thus disposed of the claims advanced by the Defendant to be remunerated for the services which other persons performed. I now come to a consideration of those which have been rendered

by himself. With a view to induce the Court to lower its estimate of his claims, two facts are now relied upon by the Plaintiffs. The first is that before the adventure by the Madeline took place, another vessel, the Reliance, returned from a successful trip to the Louisa Shoal, bringing favourable reports of the weather in the China sea, and of the position of the New Jersey upon the Shoal. The second fact which perhaps, is rather a consequence flowing from the first, is that an insurance of one of the vessels engaged in this service was effected on the usual and ordinary terms. Whether the inference to be drawn from the evidence, as to the probabilities of success and the small degree of risk to be incurred, would or would not be affected by what afterwards took place, the loss of the Reliance upon the Shoal, cannot be determined without a knowledge of the circumstances under which that loss took place—and those circumstances have not been laid before the Court. On the other hand, no facts are in proof which tend to show that any great dangers were encountered by the Madeline or that she had any considerable difficulties to overcome. and in the absence of such evidence some deduction ought perhaps to be made from the amount of compensation to be awarded to the Defendant. But such deduction is counterbalanced by another consideration which it is just and proper to pray in aid in favour of the Defendant. His is a claim in respect of property saved by the Madeline alone. The case of Brown vs. was composed of a demand, partly arising out of the adventure by the Madeline and partly out of that by the Lucile. Upon a fair consideration of the mixed and double claim, which that case presented, and blending the two accounts into one, I thought that 50 per cent on the whole outlay or capital advanced was an adequate remuneration to the party then before the Court. The adventure by the Madeline was upon the whole a much more successful adventure than that by the Lucile, the amount of property recovered by the former vessel bearing a much greater proportion to the outfit, expenses and outgoings than was the case with the lat-Now the general result of the adventure is one of the circumstances by which, as I intimated in Brown vs. Duncan, the amount of per centage must be regulated and controlled. proceeds are large and the expenses small, a larger profit may and ought to be allowed to the adventurers. They are thus remunerated in some degree both for the frugality with which they have conducted the business on behalf of the owners, and for the advantage which they are the means of procuring for them. They have therefore, if remunerated upon this principle, a direct interest

in the amount of property recovered, and in recovering it by the least expensive means. Applying this doctrine to the case of the Madeline on the one hand, and to that of the Lucile on the other. the compensation in the former would be greater, that in the latter would be proportionably less. If no evidence, tending to diminish the degree of risk and peril attending the adventure, had been offered in this case, I think the profit allowed to the present Defendant ought to be greater than that which was allotted in Brown vs. Duncan. I confess however the evidence, now for the first time laid before the Court, has considerably weakened my impressions with regard to the risk. The evidence in both cases is too meagre to permit my going into very nice calculations. But upon the whole, I think the consideration which I have suggested in favour of the Defendant may be fairly set off against the fresh evidence which has been adduced on the part of the Plaintiffs, and I therefore pronounce for the same rate of compensation as in the former case, 50 per cent upon the capital laid out. For the balance, a decree must be drawn up in favour of the Plaintiffs with their costs of suit.

## BEFORE SIR WILLIAM NORRIS, RECORDER.

Tan Boon Soo vs. Choa En Seng and another Executors of Tan Che Sang, Deceased.

Legacies to males and females are all liable to abate alike and in proportion to the amount of their respective legacies, if the assets are insufficient for the payment of all in full.

An Executor has not the option, as in the case of debts of equal degree, to give one legatee a preference over another, unless the testator's intention to give

such preference appears clearly from the Will.

If legacies are given under the apprehension that there is still a surplus, (after giving several legacies,) such legacies will, if there be no surplus, be lost, provided it can clearly be inferred from the Will, that such legacies would not have been given at all, and that they were given only on condition that a surplus should be found to exist.

Legacies which are in their nature general are not entitled to any exemption from abatement on the ground of their being applied to any particular object.

or purpose.

MASTERS vs. MASTERS, 1 P. Wm. 243, questioned.

If an Executor voluntarily pays a legacy in full, and afterwards it is necessary for all the legacies to abate, he will be liable to the unpaid legatees to make up the amount which he has paid in excess of what such legatee was justly entitled to, and an excuse that such payments were made under an impression (which was wrong,) that the testator had shewn a preference to the so paid legates, will not assist them, as they shauld not have acted upon it without the previous sanction of the Court, whose direction in such eases ought always to be sought and would readily be afforded.

The legatees who have been paid in full without any claim to a preference are, in the event of the Executor's insolvency, liable to be called upon by the

unsatisfied legatees to refund each the amount which he has received in excess of what he was justly entitled to, had a fair distribution of the actual fund been made.

SEMBLE.—If the payment was not voluntary, but by compulsion of a suit the Executor may compel the legates to refund in the event of a deficiency.

QUERY.—Can the Trustee compel such legatee to refund if the money was voluntarily paid by him?

Interest will not be allowed on such excess, if such paid legatee has no further property in the Estate.

JUDGMENT.

With reference to the arguments on both sides it seems to me;

First—That the Female Legatees are not entitled by the Will to any preference (as assumed and acted upon by the Executors in their account, and by their Agent, Mr. Napier, in justification of their act) and to have their legacies paid in full before the Males.

Secondly—That the Male Legatees are not (except as to any residue and here there is none) entitled by the Will to any preference over the female (as assumed by their Agent, Mr. Baumgarten, in his 2d paper, though in his 1st paper, he did not go this length but contended that Males and Females must both abate in pari passu.)

The above two points are so clear from the two translations of the Will by Mr. Morrison and Mr. Dickenson, which substantially agree in all important particulars, that it is needless to say more on the subject, than that I consider all the Legatees named in the former part of the Will to stand on the same ground, and (the assets being insufficient for the payment of all in full) liable to abate alike and in proportion to the amount of their respective legacies; (Clarke v. Sewell, 3 Atk. 99) nor has an Executor the option as in the case of debts of equal degree, to give one Legatee a preference over another (Ashley v. Pocock, 3 Atk. 208) unless the Testator's intention to give such preference appears clearly from the Will, which it certainly does not, in this instance (Action v. Action, 1 Meriv 178) except as aforesaid in the event of any residue which here there is not.

Thirdly.—As to the Legatees named in the after part of the Will, I cannot agree with Mr. Baumgarten as contended in his 2d. paper, "that the whole tenor of the Will shews an intention existing in the Testator's mind that the first bequests should have a preference"—altho' it cannot be denied that the former part of the Will does, taken alone and without reference to what ollows, shew, as Mr. Baumgarten argues "an original determination of the Testator to leave the whole of his Estate to his sons, daughters, and grandsons named in certain proportions." For admitting this

to the fullest extent, and also "that when he sat down to make his " will he had no intention whatever of leaving anything to others, "and that the bequest of any thing to the last named Legatees " was entirely an after thought," still it by no means follows, and cannot justly be presumed without further evidence of intention that the Legatees first named were ultimately and at the completion of the Will intended to be preferred over the others solely because the Testator had in the first instance forgotten or perhaps not intended to provide for these though he afterwards recollected or changed his intention and provided for them accordingly. Whether then such ultimate intention of preference existed in the mind of the Testator must be gathered from a consideration not of the former part only but of the entire tenor of the Will. Now the sole object of the specific directions given in the former part of the Will, as to the mode of paying the Legacies to the male and female children, seems to have been the prevention of any mistake as to the manner of dividing the residue should there be any. This but for such directions, the Executors might naturally suppose was meant to be divided rateably in proportion to their respective legacics among all the children without preference or distinction. To prevent therefore any such mistake of his wishes in that respect, he enjoins the Executors "first to take out all the sons and daughters shares and pay them clear off," and then, "as to aught "remaining over and above these shares it should be given to the " male children and grand-children in the order of their names "&c." Such, it appears to me, is the meaning of this clause of the Will, the word "first" being used in this connection simply by way of introducing and rendering more clear and explicit what next follows, viz., the mode of dividing the surplus should there be any; and having no reference whatever, as might prima facie be imagined, to the subsequent legacies, nor intended to intimate that these were to be postponed until the prior and preferable legacies should first have been paid in full. This latter construction. indeed, would be irreconcilable both with the Plaintiff's argument that the subsequent legacies had not at that moment been thought of, and with the clause itself which implies as much by disposing of the residue to a portion of the first named Legatees. The expression of any such intention of preferring the former to the subsequent Legatees, if to be found at all in the Will, must then be sought for in some of the succeeding Clauses. And it is clear that in the Clause itself which contains the subsequent bequests there is no expression of the kind, but rather the contrary: "I " plainly declare that Thieng Pit shall get 5000 Dollars"-and

so of the rest, without any qualification or reservation whatever. What follows is still more decisive.—"All relatives, near or distant, none of you must cause trouble;" and again.—"As to all "the names in order, when they require to receive their portions, "whether old or young, let them he delivered to them according "to the laws of the Company" (meaning, says the Translator, the East India Company's Government). Can any thing more clearly show the Testator's intention that all his relations, near or distant, old or young, should come in pari passu, without preference or partiality, in proportion to their respective bequests.

But, it is further contended, that "where one gives legacies, " and appelending there will be a surplus," (as did the Testator in this instance) "gives further legacies by his Will or Codicil. "the legacies first given shall have the preference." This position, however, is, I conceive rather too broadly laid down. In Mr. E. V. Williams's excellent Treatise on the Law of Executors and Administrators, page 841, he thus, (on the authority of three decided Cases which I have not the means of referring to in detail,) states the law upon this subject. "If by the express words or fair "construction of the Will, the intent of the Testator is clearly " manifest to give one general legatee a priority to the others, "that intention must be carried into effect (Blower vs. Morret. 2 "Ves: Senc. 420): As where the Testator gave legacies to his "two Sons and his daughter, with a proviso, that if the Assets " should fall short for the satisfaction of those legacies, his daugh-"ter, notwithstanding, should be paid her full legacy (Marsh v. " Evans, 1 P. Wms. 668.) So, where the Testator after giving " various legacies, expressed at the end of his Will his apprehension "that there would be a considerable Surplus beyond what he had " before given away, for which reason be gave several further lega-"cies, and he afterwards, by a codicil gave several further legacies; "it was decreed, that the subsequent legacies having been given " on a presumption that there would be a Surplus, and there hap-" pening to be no Surplus, the former legacies should have a pre-"ference, and the legacies at the end of the Will be lost; and also, "that the same apprehension must be intended to liave continued "in the Testator at the time of making the Codicil; and therefore, " unless the inference could be repelled the legacies by the Codicil "must be lost also (Atty. Genl. v. Robins, 2 P. Wms. 23)." Now it is quite clear that the present case cannot be assimilated to that of Marsh v. Evans, where the intention of preference was clearly expressed in the Will. And the Case of Atty. Genl; v.

Robins, also appears to me to be very distinguishable from the present, on two grounds. In the first place, the precise terms made use of by the Testator in that case, "for which reason," seem clearly to have implied, in the absence of any expressions to the contrary, that but for that reason (the expectation of a Surplus) the subsequent legacies would not have been given at all, and that they were given only on condition that a Surplus should be found to exist. In the present instance no condition of this kind is either expressed or appears to be clearly inferrible as in that case. But Secondly, even if such inference might fairly be drawn in the absence of aught to repel it, I think it is sufficiently repelled by the general expressions already quoted, showing the Testator's intention to give no such positive preference to one set of Legatees over the other in the division of his Estate, all of them, whether near or distant relations, old or young, being as it were brought together towards the close of the Will and enjoined to give no trouble but be satisfied with their respective portions; the Testator appearing to have no doubt but that there would be enough to pay all in fail, and certainly not directing that in the event of any deficiency any one or more were to be paid in preference to the rest.

'But it may be further contended, perhaps, that that clause containing the subsequent bequests is void, as repugnant to and irreconcilable with what precedes, by assuming the existence of a fund already disposed of in the prior part of the Will, viz., the residue which might remain after payment of the first legacies, and which had been expressly given to the male children and grand-children before-mentioned. This position, however, is untenable and fallacious on many grounds. The rules which govern the construction of Wills are liberal and not controlled by the same regard to forms and technicalities as is necessary in the construction of deeds. It is a principle that a Will must be most favourably and benignly expounded, to pursue, if possible, the intention of the Testator as apparent from the whole Will, and that words and limitations may be transposed, supplied, or (if insensible) rejected for this purpose: again, that the intention of the Testator is not to be set aside because it cannot take effect to the full extent, but is to work as far as it can; again, that effect must be given to every word of the Will provided an effect can be given to it not inconsistent with the general intent of the whole; as, if a man devises land to A. in fee and afterwards in the same Will devises the same land to B. for life, both parts of the Will shall stand, and in construction of law the devise to B. shall be first (Anonymous Cro. Eliz. 9). And

lastly, where the separate parts of a Will are absolutely irreconcilable, the latter will prevail. All these principles and rules which are too well established to need a citation of Authorities, are directly opposed to the position last assumed on behalf of the Plaintiff and plainly warrant the construction that the bequest of the residue, if any, was not intended to take effect, until all the other legacies had been satisfied.

With regard to the argument for a special preference of one individual legacy that of Mr. Baumgarten's client, the Plaintiff in this suit, founded on the presumption that this particular bequest of 15,000 Dollars was manifestly intended by the Testator "to be " placed beyond the possibility of being defeated by any deficiency "in the residue," inasmuch as that bequest was saddled with an obligation peculiarly sacred, viz., the devotion of 5,000 Dollars to "the due performance of the religious observances to the manes of the Testator's parents;" this reasoning, though plausible, cannot countervail the authority of decided cases, which leave no room for doubt upon the subject. It has been decided that legacies which are in their nature general, are not entitled to any exemption from abatement on the ground of their being applied to any particular object or purpose: Thus legacies of a certain sum each to Executors for their care and trouble, or of sums of money for mourning rings, or to servants, or to charities, are not to be preferred to other general legacies. (See the cases cited in Williams 840.) A decision in one case, indeed, Masters v. Masters 1 P. Wms. 423, is opposed to the general current of authorities; Lord Parker having in that case exempted a legacy of a certain sum for building a monument to the memory of a relation from abating with the general legacies; but the soundness of that decision is said to have been doubted on strong grounds, and standing as it does alone, at variance with the principles laid down in numerous other cases, and directly opposed by a subsequent decision of Lord Thurlow in a precisely similar case, (Blackshaw v. Rogers, cited by the Master of the Rolls in Simmons v. Vallance 4 Bro. C. C. 349.) cannot now be regarded as of any authority.

It being clear, then, to my mind that all the Legatces named in the Will, whether in the former or latter part, stand on exactly the same footing, the serious question arises whether the Defendants, the Executors, by having voluntarily paid a portion of the Legatces, the daughters, in full, have thereby rendered themselves liable to make good to the Plaintiff and the other legatees the deficiency, about one fourth, being the extent to which they have

been compelled to abate on the ground of an alleged insufficiency of assets to pay the whole in full. And if this were the only ground, there can be no doubt that the Executors would have been thus liable; the general rule referred to by Mr. Baumgarten being, as laid down by Sir John Strange M. R. in Orr. v. Maines. 2 Ves. Senr. 194. "that whenever an executor pays a legacy, the " presumption is that he has sufficient to pay all legacies, and the "Court will oblige him if solvent to pay the rest; and not permit " him to bring a bill to compel the legatee whom he voluntarily " paid, to refund." Where the payment was not voluntary, but by compulsion of a suit, the executor may compel the legatee to refund in the event of a deficiency; and so also where debts afterwards appear of which he had no previous notice. In the present instance the payment appears to have been voluntary, and the complaining party is not a creditor but an unsatisfied legatee. If therefore, as already observed, the alleged insufficiency of assets to pay all were the only proffered ground of excuse for preferring some of the Legatees, the Executors would, most undoubtedly, according to the above general rule, have rendered themselves personally liable for the deficiency of assets not being admissible against the presumption to the contrary arising from their own act. But fortunately for the Executors, a further and apparently more valid ground of excuse is urged by them in justification of their act, viz., the supposed authority of the Will itself, for the preference shewn to the females: not that even this could have availed them, had it been perfectly clear, from the absence of all rational or plausible ground for such an interpretation, that they must have acted malá fide. I confess, I am not quite satisfied, in my own mind, that their interpretation was even plausibly defensible and not rather obstinately perverse or altogether pretended. At all events it is certain that the construction which they chose to put upon the Will in this respect was not so entirely free from doubt, or rather was so very doubtful that they ought not, in common prudence and good faith, to have acted upon it without the previous sanction of the Court, whose direction in such cases ought always to be sought and would readily be afforded (a.) the sworn answer of the Defendants, therefore, be admitted as sufficient proof, in the absence of any express evidence to the contrary, that the account appended to that answer, and exhibiting the amount of assets available for distribution among the Legatees, is correct, so as to limit the responsibility of the Executors to that amount, it can only be deemed sufficient on the ground

<sup>(</sup>a.) See In re Mary Hooper, 30 L. J. ch. (N. S.) 795.

that the Defendants have, in the judgment of the Court, when it shall pass its decision in this case, acted boná fide, and really understood and believed the intentions of the Testator to be as they have represented them. Should the Court, however, be inclined to take this lenient view of the Executors' conduct, they will nevertheless not be altogether exonerated from further responsibility to the Plaintiff and the rest of the male legatees. sets (assuming the correctness of the accounts to be admitted) having been originally insufficient, the female legatees who have been paid in full, without any claim to a preference, are conditionally liable to be called upon by the unsatisfied legatees to refund each the amount which she has received in excess of what she was justly entitled to had a fair distribution of the actual fund been made, as it should have been, in the first instance, among all the Legatees rateably in proportion to the amounts of their respective legacies. (See Walcot v. Hall 1 P. Wms. 495 and other cases.) I say conditionally liable, because the remedy is in the first instance against the Executors, and it is only in the event of their insolvency that resort can be had to the Legatees to compel them to refund what was voluntarily paid to them by the Executors. This was expressly laid down by the Master of the Rolls, Sir John Strange, in the case of Orr v. Kaines, above referred to, and the rule does not appear to have been sub-equently questioned or departed from (a.) It appears to me, therefore, that the Plaintiff is entitled to Judgment against the Defendants for Drs----(being the difference between Drswhich he has actually received and Drs---which he ought to have received had the assets been rateably divided, as they should have been, in the first instance among all the Legatees without preference or distinction), and Costs of suit. As to the claim for Interest, it cannot be allowed. Lord Eldon in the case of Gittins v. Steele. 1 Swants. 200, stated the rule in such cases as follows: "If a legacy has been erroneously paid to a " Legatee, who has no further property in the Estate, in recall-"ing that payment I apprehend that the rule of the Court is not " to charge interest; but if the Legatee is, entitled to another fund " making interest in the hands of the Court," (which is not the case here) "justice must be done out of his share."

Whether the Executors, after having answered for the consequences of their error to the unsatisfied legatees may be allowed to recover over from the females, to whom they gave so unreason-

<sup>(</sup>a.) The money must be claimed within a reasonable time, Clifton vs. Cockburn, 3. My. & K. 76, & Atty. Gen. vs. Mayor of Exeter, 3 Russ. 205.

able and unauthorized a preference, is a question not at present before the Court, and upon which I am not called upon, therefore, to say one word. But as some anxiety may be felt upon the subject, it may be as well to intimate that I see no sufficient ground at present for encouraging such an expectation, should it exist. I am not aware of any direct decision upon the subject, and the only case I have yet met with bearing any analogy to (though in the main it is very distinguishable from) the present is that of Livesey v. Livesey, 3 Russ. Chanc. Cas. 287, where an annuity was bequeathed to a Legatee on his coming of age. The Executrix, by mistake, made payments to him in respect of his annuity for two years before he was entitled to it, and was held to be justified in retaining them out of the future payments of the annuity. (b.)

(b.) In the case last cited the legatee had still a property in the Estate and this might have been the reason for the Court allowing the Executrix to retain the excess out of the future payments. See Gittins vs. Steele, cited, supra.

# 30TH APRIL, 1849.

## BEFORE THE HON'BLE SIR CHRISTOPHER RAWLINSON, RECORDER.

#### GUTHRIE & another vs. Mc. KIE.

By a Bill of Lading for goods shipped, "freight to be paid here (at port of shipment) one month after sailing, ressel lost or not lost," the shipowner or Master does not lose his lien for freight unpaid, although credit is thus allowed and a fixed and distant day named.

The mere making of an agreement for freight, does not exclude the right of lien, unless its terms are clearly inconsistent with such a right.

Trover for a bale of merchandise. Pleas:—1st, the general issue; 2nd, not possessed.

This was an action to try whether the defendant, the master of the ship Tapley, had a lien for freight under the following Bill of Lading:—

"Shipped, in good order and condition by William Rose & Co., of Liverpool, in and upon the good ship or vessel called the Tapley, whereof is Master, for this present voyage, G. McKie. lying in the port of Liverpool, and bound for Singapore, four bales merchandise, being marked and numbered as per margin; and are to be delivered in like good order and condition, at the aforesaid port of Singapore, (all and every the dangers and accidents of the Seas and Navigation, of whatsoever nature and kind, excepted,) unto Messrs Guthrie & Co., or to their Assigns; Freight for the said Goods to be paid in Liverpool, at the rate of thirty shillings per ton of 40 cubic feet. with Primage and Average accustomed. In Witness whereof, the Master or Purser of the

said ship or vessel has affirmed to four bills of lading, all of this tenor and date; one of which being accomplished, the rest to stand void. Dated in Liverpool, this 11th August 1848. 'Freight to be paid here in one month after sailing, vessel lost or not lost.'\* Weights and contents unknown to G. McKie."

#### JUDGMENT OF THE COURT.

This action was brought to try the right of the defendant to retain possession of certain goods consigned by the plaintiffs' agents at Liverpool to the plaintiffs at Singapore, and for which the freight had not been paid.

The Bill of Lading was in the usual form save that it provided that "the freight was to be paid in Liverpool one month after sailing, the vessel lost or

not lost."

It was contended on the part of the plaintiffs that no lien was claimable on these goods in consequence of this special provision in the Bill of Lading.

Let us enquire what is a lien,—and what is the state of the law respecting it—and what destroys a lien.

A lien is a right to retain the property of another until a debt due from that person has been satisfied—and rests upon principles so convenient and equitable that, to use the words of Best C. J. in Jacobs v. Latour 5 Bing, 132 it cannot be too much favoured."

I am speaking of a particular lien, as in the case before us. The doctrine of lien was originated to meet the cases, such as those of Carriers and Innkeepers, who were compelled to receive and be responsible for the goods of parties. It has since been much extended and the decisions of the Courts during the last 30 years have tended to place the law relating to liens on a more reasonable and intelligible footing than formerly.

It was once considered that whenever the parties made a special Agreement the right of lien-was abandoned (see Rolls Abridt tit. Justif. pl. 1.2. Chapman v. Allen, Cro: Car: 271., Brenan v. Currint, Sayers Rep. and other old cases. But this doctrine has been now some years overruled; and the rule now clearly established is—that the mere existence of a special agreement, does not exclude the right of lien, unless some of its terms are clearly inconsistent with such a right.

The strongest authority for a contrary view cited by the plaintiffs' advocate was the case of Cowel v. Simpson 16 Vey. 275. The authority of this case is thus treated by Lord Henley in his Baukruptcy law 290, as early as 1825; "perhaps it might not be amiss to qualify the generality of the doctrine laid down by Lord Eldon in Cowel v. Simpson in the mode pointed out by the King's Bench (alluding to the case of Steavenson v. Blakelock, 1 M. and S. 535; Chase v. Westmore, 5 M. and S. 190; Crawshay v. Homfray, 4 B. and A. 51) and to consider the taking of a security as not necessarily a waiver or abandonnent of the right of lien, but only, where the nature of the security or the circumstances attending the taking of it are inccusistent with the right of lien." In the work on Mercantile law by the late Mr. Smith, one of the most accurate and able Lawyers I ever met with, the case of Cowel v. Simpson is not cited—a fact proving to my mind that he considered it a case of no great weight; but I think that there is little doubt but that that case, at all events as far as regards the point under consideration, may be considered as

<sup>\*</sup> On the margin.

overruled, except for the doctrine (see C. J. Tindal's judgment in Hewison v. Guthrie 2 N. C. 759) "now well established by the authorities cited at the bar that if a Security is taken for the debt for which the party has a lien upon the property of the Debtor, such security being payable at a distant day, the lien is gone."

It is equally clear now that the taking of a Security for the payment of the Freight or carriage of goods does not destroy the carriers's lien; unless such security be payable at a day subsequent to the delivery of the goods—Hewison v. Guthrie 2 N. C. 759, and see Cowper v. Green 7 M. & W. 633, Stevenson v. Blakelock 1 M. & S. 535, in which last case Lord Ellenborough observed: "that the bill having been dishonored placed the defendant in his original position as to his lien."

In Hutton v. Brag, 2 Marshall 45, S. C. 7 Taunt. (since over-ruled, asto its main points) Gibbs C. J. expressly guarded against being understood to say, that the lien which had been taken away by an agreement to pay in bills would not be restored after the bills had been dishonored.

I am not inclined to subscribe to the expression "taken away" as correct—agreeing with the advocate for the plaintiffs, that unless a lien attaches to the goods originally, no subsequent default will give such right. The suspension and non-existence are different: from the Judgment of Mr. Justice Holroyd in Crawshay v. Homfray, 4 B. and A. 50, the principle above laid down is to be collected,

An expression towards the close of Mr. Justice Best's Judgment in that case, relied on by Mr. Logan on behalf of the plaintiffs, is not inconsistent with my decision here, if applied to the facts of the case then before the Court, in which no lien had ever existed; the wharfage not being payable till the Christmas after the arrival of the goods.

A passage cited from Abbot on Shipping 7th Edit. 231, was also much relied on. I find that the only authority there cited to show that an Agreement to pay before delivery would defeat a lien, even if the passage can fairly bear such an interpretation, in Lucas v. Nockels 4 Bing. 729, where the payment was to be ten days after, and where it is clearly laid down that any stipulation for dealing on credit is destructive of a claim of lien. Numerous other cases were cited during the argument, which nearly all relate to questions of lien between the ship-owner and the charterer-I allude to the cases of Bothbury v. Inglis 3 East 384, Tate v. Meek 8 Taunton 280, Christie Lewis 2 Br. & B. 410, Saville v. Campion 2 B. & A. 503 and Campion Colville 3 N. C. 17, in which last case the principle is clearly acknowledged "that the lien attaches in all cases where the payment for the freight of the ship is to precede or accompany the delivery of the goods," adopting the Judgment of the Court of King's Bench in Campion v. Colville. In these last mentioned cases no doubt or difficulty seemed to arise as to this principle, the great contest in most of them, being whether the ship-owner had retained such a possession of his Vessel as to be allowed to exercise the right of lien.

We have no difficulty of that kind here. The point therefore to be ascertained is, is there anything in the agreement under these Bills Lading (for I see no substantial difference between them) inconsistent with the party still retaining his security of a lien on the goods carried. I can see none. Many instances might be cited where parties before doing work always require some additional security, or even a payment or part payment in advance

when half the work is done; and it is clear on the authorities cited that unless the agreement made or security given postponed the time of payment till after the delivery of the goods, or contained some term showing that the parties intended that no right of lien should exist, the right would continue intact.

I regret that being on circuit, away from my Library, I have not been able to look so completely through the cases as I should have wished. I confess that I should have been better pleased had I been able to have referred to some more express decision on the exact point now under consideration; but the principle is so reasonable and one calculated to prevent so much injustice that I arrive at my present conclusion without much hesitation. Had the law been such as was contended on behalf of the Plaintiffs, it would have enabled them to avail themselves of the labors of the Defendant, and after a breach of contract on their part to have taken the goods out of his possession leaving to him a bare right of action, under which he might never have recovered a farthing. The result is: that I am of opinion that the plaintiffs are not entitled to recover in this action; or in other words, that the defendant was entitled to be paid for the carriage of these goods before he could be called on to deliver them to the plaintiffs.

Judgment for the defendant.

Free Press. May 10.

#### In the Goods of CHOA CHONG LONG, deceased.

This was a case brought before the Hon'ble Sir Richard Mc. Causland, on the 25th, of June 1857, to quash the Will of a wealthy Chinaman born and domiciled in Singapore. The Testator died on the 18th of December 1838, at Macao, in his Will he bequeathed the whole of his landed property in Singapore and Malacca to three Gentlemen, their Heirs, Executors and Administrators for ever, upon Trust, to receive the rents, issues and profits thereof, and to pay certain legacies to his four sons and daughters and a monthly allowance for another son during his lifetime-the residue of which, after providing for repairs and insurance, is to be expended in the performance of religious ceremonies called Sin-chew. or in other words to feed his own ghost or spirit and the spirits of his deceased wives, four times a year and oftener if the funds would admit; this bequest the learned Judge held valid. In deciding it, he said, he was of opinion that the Court is bound to declare it valid, and to give effect to those provisions of the Charter, which directs that, "all or any of the powers thereby committed to the Court shall " be executed with an especial attention to the different religions, manners " and usages of the persons, who shall be resident or commorant within its "jurisdiction, and accommodating the same to their several religions, manners, " and usages, and to the circumstances of the country, as far as the same can " consist with the due execution of Law, and the attainment of substantial "justice." This case was overruled by another, on the same Will, by His Honor Sir Benson Maxwell, on the 19th February 1869. See Choa Choon Nech vs. Spottiswoode, the third case following.

For Choa Chong Long's case, see the Straits Times of 14th July 1857, Penang Gazette 29th. Idem, and Woods' Oriental Cases, p. 13.

Further, see Regina vs. Willans ante p. 67, and Note b. to the same, p. 94.

### In the Goods of Lao Leong An, deceased.

Administration granted to the first wife of a Chinese. The second wife entitled to an equal share of the Intestate's property. The law of China considered.

Singapore, Daily Times,-1867.

Judgment of the Hon'ble Sir P. B. Maxwell, Knt., Recorder.

In this matter, two petitions were filed praying for Letters of Administration; one by the first, and the other by the second wife of the intestate, a Chinese inhabitant of this Settlement. I see no sufficient reason for refusing the application of the first wife, and Letters of Administration will therefore be granted to her. But as it was much urged, in resisting the claim of the second wife, that the condition of the latter was not that of a wife but merely of a concubine, I think it right, with the view of saving the parties the expense and suffering of a litigation, to say that I had to consider this question some years ago in Penang, and that I was of opinion that a second or inferior Chinese wife was to all intents and purposes a lawful spouse and was entitled to share with the first or superior wife in the property of her deceased husband; and it may be as well if I state now the grounds of my opinion. It may seem difficult to apply the English statute of distributions where poligamy is a recognised institution; but this difficulty was long ago solved in this Settlement, by holding that where a Mahometan died intestate leaving two or more wives, they were entitled to share equally among themselves the share which the statute of distributions allots to the widow of a deceased person. the case of Mahometans, however, all the wives are equal. Chinese polygamy differs in this respect, and the first question for determination is whether the second wife can be regarded as a lawful shouse at all. The first wife unquestionably holds higher rank in the household; she addresses her husband in terms of equality, while the inferior wives address both him and her as their superiors. The first wife is usually chosen by the husband's parents of a family of equal station and is espoused with as much ceremony and splendour as the parties can afford; while the inferior wives are generally of his own choice made without regard to family connection. But that they are wives not concubines seems to me clear from the fact that certain forms of espousal are always performed, and that, besides, their children inherit in default of issue of the principal wife, and that throughout the Penal Code of China they are treated as wives to all intents and purposes as well as the first. Thus, to make a first-wife marriage during

<sup>\*</sup> Vide In re Chu Siang Long, Estate, latter part, (Malacca case).

the period of mourning for parents, is punishable with 100 blows: to make a second-wife marriage in the same period is punishable with 80 blows. So, to marry while parents are in prison for a capital offence is punishable whether it be a first-wife or a secondwife marriage, but in the latter case by 20 blows less than in the former. Incest is punishable in both cases, but with 20 blows less in the case of the inferior marriage, Sects. 106-109. The law of divorce applies equally to inferior wives. They may be divorced for the same causes as the first wife and for none other: and all infringements of this branch of the law are punished with a similar reduction of two degrees, or twenty blows, in the case of the inferior marriage. A man who sells his first or superior wife is liable to 100 blows and perpetual banishment; he who sells his inferior wife is liable to 80 blows and two years banishment, Sect. 275. He who connives at, or compels his wife's adultery, is, punishable but with one degree of greater severity when she is the first, than when she is an inferior wife. If the first wife strikes her husband, she is punished with 100 blows. If the inferior wife strikes him or his first wife, she is liable to a punishment one degree more severe, viz: 110 blows. If the husband wounds either, he is punishable, but with one degree of less severity when she is an inferior, than when she is a first wife.

It may be true as was contended, that in China the inferior wives have no share in the estate and effects of their deceased husband. But this is immaterial for the purpose of the present question. If it were otherwise, the first wife would not find it easy, any more than the second, to establish her right to Letters of Administration. The intestate was domiciled in this Settlement, and his personal estate must therefore be distributed according to the law of the Settlement. He had, besides, real estate here, and this, independently of his domicil, must devolve according to the lew loci, that is, in the same way as chattel property, according to the construction, long established, of the Act of 1837.\* The rights of his wives therefore must be determined by our law and not by that of China.

And here comes the second question for determination, viz: as to the relative rights of the first and inferior wives, inter se, in dividing the share which our law allots to the widow. They are not on a footing of equality like Mahometan wives; but our law, to which polygamy is not only foreign but repugnant, furnishes no rule for determining in what proportion wives of higher and lower rank shall share the widow's share, and I am unable to see any adequate grounds for any other division than an equal one.

<sup>\*</sup> See case on page 383 decided in June 1876.

### THE TRANSFER.

From the Indian to the Colonial Government.

GOVERNMENT GAZETTE, 1st April, 1867.
Government Notification.—No. 1.

. Notice is hereby given that, by the authority of an order of Her Majesty in Council, dated 28th December 1866, of a Charter under the Great Seal of England, dated 4th February 1867, and of a Commission also under the Great Seal, and dated 5th February 1867, addressed to His Excellency Colonel Harry St. George Ord, C.B., R. E., His Excellency has this day assumed the Government of the Straits Settlements.

By His Excellency's Command,
R. MACPHERSON,
Acting Colonial Secretary.

Colonial Secretary's Office, 1st April 1867.

#### Government Notification-No. 7.

Notice is hereby given that, all Officers holding appointments under the Letters Patent for reconstituting the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, dated 10th August 1855, will continue to hold their appointments in the Government of the Straits Settlements under the aforesaid Letters Patent.

Her Majesty has been pleased to approve of the Recorder of Singapore being henceforth styled Chief Justice of the Straits Settlements, and the Recorder of Penangbeing henceforth styled Judge of Penang.

By His Excellency's Command, R. MACPHERSON, Acting Colonial Secretary.

Colonial Secretary's Office, 1st April 1867. Before His Honor Sir W. Hackett, Knt., Acting Chief Justice.

Veeramah v. Sawmy.

The Court has no jurisdiction on its Ecclesiastical side to entertain suits for the restitution of conjugal rights of Hindoos. (August 1867.)

This was a libel instituted by a Hindoo wife against her Hindoo husband on the Ecclesiastical side of the Court, for restitution of conjugal rights. The Defendant protested against the supposed jurisdiction to the effect that "this Court ought not to have " or take further cognizance of this suit because he saith that this " Court is incompetent to take cognizance of or proceed in the " suit or to administer towards and upon the plaintiff the Ecclesiastical Law as the same at the date of the Letters Patent escapitation," this Court may be used and exercised in the Diocese " of London, in Great Britain."

Protest allowed. \*

\* Et Vide Perozeboye v. Aderser Cursetjee, 10 Moore P. C. C. 374.

#### SUPREME COURT.

Before His Honor Sir P. B. Maxwell, Knr., Chief Justice. Choa Cheow Neoh v. Spottiswoode. \*

Will by a Chinese directing rents and profits of land to be expended in "Sinchew" ceremonies, held void, as being contrary to the law against perpetuities, and not a charity. Superstitious uses considered.

Straits Observer, 19th Feb., 1869.

#### JUDGMENT.

In this case the testator, Choa Chong Long, a person born and domiciled in Singapore, but of Chinese descent, by his Will, in the English language, after bequeathing legacies of 500 Dollars apiece to each of two sons and four daughters, and making provision for another son, and after reciting that he was erecting a building for charitable purposes, and for the performance of religious ceremonies, according to the custom of his ancestors, called Sin Chew, to perpetuate the memories of his departed wives, as also of himself, after his decease, devised certain houses and land in Singapore and Malacca, and also his residuary estate, to trustees, upon trust, to apply the rents and profits, after providing for repairs and insurance, "in the performance of such Sin Chew or Charity, in and to the manes of myself and my said wives hereinbefore named and mentioned, to be performed four times in each and every year at the least, and as much oftener as the funds applicable thereto will admit." The Will contains also a direction to the trustees to see that the "Charity" is faithfully

<sup>\*</sup> This case overrules In re Choa Chong Long's Estate, ante page 417.

carried into effect according to the mode practised in cases of Charities in the Indian Presidency towns; it requires that the lands devised shall be held and continued in the testator's own name for ever, according to the term of the original grants; and it declares that the testator's wish is to preserve the funds so intended to be applied to such religious and charitable purposes as aforesaid, from being embezzled or made away or interfered with by his sons, daughters or relations, or otherwise diverted from the purposes contemplated, not doubting that the East India Company and those in authority under them, would by due enforcement of its provisions, encourage wealthy, industrious and honest Chinese and other settlers in the Company's territories, to follow his example and thereby ultimately advance the wealth, prosperity, and permaneucy of its possessions in these parts.

The testator died about thirty years ago, leaving the two sons and four daughters to whom he had given the pecuniary legacies mentioned, and who, or whose representatives, are the plaintiffs in this suit, and leaving the other son already referred to, whom he describes as an object of his especial affection, but who is said by the plaintiffs to be illegitimate. The personal representative of this son is a defendant in this suit, but is out of the jurisdiction, and has not appeared or pleaded. The other defendant is the representative of the testator.

After the death of the testator, several applications were made to this Court, on its Equity and Ecclesiastical sides of the Court. by some of the plaintiffs or next of kin under whom some of them claim, the general result of which seems to be that a receiver was appointed, that it was ordered that the sum of Drs. 280 a year should be set apart out of the rents for the performance of the ceremony mentioned, and that the residue of the rents and profits should be paid into the Treasury to the credit of the Sin Chew The fund thus accumulated amounts now to upwards of Drs. 33,500. These various proceedings were set up by the answer as a bar to this suit, but I held at the hearing that they had not that operation, whether regard were had to their ex parte character, or to the side of the Court in which some of them had been taken. It is therefore incumbent on me to determine the question raised by the suit. The petition prays that it may be declared that the devise for the Sin Chew is void, and that the testator died intestate as to the property devised for that purpose, and consequently that it goes to the next of kin. 1

Several Chinese men of learning have been examined for the

purpose of ascertaining what are the nature and object of this devise; and the substance of their evidence is as follows:-The word Sin Chew is composed of Sin, which means a spirit, soul or ghost; and Chew, which means ruler; and the composite word means the spirit ruler or spiritual head of the house. When a man dies. his name, with the dates of his birth and death, is engraved on a tablet; this is enclosed in an outer casing, on which a new name, which is now for the first time given to him, and the names of his children, are engraved. This tablet is kept either in the house of the worshipper, or in that which has been set apart for the Sin Chew. It is sacred, and can be touched only by the male descendants or nearest male relatives of the deceased, who alone may look upon the name on the enclosed tablet. It is the representation of the deceased. At certain periods, viz., on the anniversary of his death, and once in each of the four seasons. his son or sons, or if he has none, his nearest male relative, but never his daughters or other females, go to the place where the tablet is, and lay on a table in front of it a quantity of food, such as pigs, goats, ducks, fowl; fish, sweetmeats, fruit, tea and arrack. They light joss-sticks, fire crackers, burn small squares of thin brown paper in the centre of each of which is about a square inch of gold or silver tinsel, they bow their hands three times, kneel, touch the ground with their foreheads, and call on the Sin Chew by his new name to appear and partake of the food provided for him. The food remains on the table for one or two or even three hours, during which time the spirit feeds on its ethereal savour; and to ascertain whether it is satiated or satisfied. two pitis (Chinese coins) or two pieces of bamboo are thrown on the table or on the ground in front of it, and if they both turn up with the same face, the offering is considered insufficient, and more food is laid on the table. After the lapse of a sufficient time to allow the spirit to partake of it, the same test is again resorted to. and so, until the coins or bamboos, by turning up different faces. The food is then removed, shew that the spirit has had enough. and eaten or otherwise disposed of by the relatives, but there is no distribution of it in charity or among the poor. Indeed the Chinese have a repugnance to food which has been offered in this way, except when they are members of the family. The papers which are burnt supply the spirit with money and clothing, the The papers gold and silver tinsel turning into precious metal. No prayers are offered to the spirit; the person who makes the offering of food asks for nothing whatever. The primary object of the ceremony is to show respect and reverence to the deceased, to preserve his memory in this world, and to supply his wants in the

other. Its performance is agreeable to God, the supreme all-seeing, all-knowing; and invisible being, who assists and prospers those who are regular in this duty; and its neglect entails disgrace on him whose duty it is to perform it, and poverty and starvation on the neglected spirit, which then leaves its abode (either the grave or the house where the tablet rests) and wanders about, an outcast, begging of the more fortunate spirits and haunting and tormenting his negligent descendant, and mankind generally. To avert the latter evil, the wealthier Chinese make, in the seventh month, every year, a general public offering, or sacrifice, called Kee-too or Poh-toh for the benefit of all poor spirits.

The question is whether this devise or bequest is valid.

No difficulty arises in respect of the 9 Geo. 2 c. 36, commonly called the Mortmain Act; for that Act is not law here, Attorney General v. Stewart, 2 Mer. 163, and consequently lands may be devised for any uses which are recognized by our law as charitable. It was admitted, however, by Mr. Woods, who contended for the validity of the devise, that it did not fall under the legal designation of charitable; and it seems to me that it would have been difficult to establish that it did. The term charity receives. in questions of this kind, a peculiar but wide meaning; and although the Statute of Charitable Uses may not be law here, I think that it may be laid down that not only the various objects mentioned in its Preamble-such as gifts and devises for poor people, for sick and maimed soldiers and sailors, for schools, education and learning, for the repair of churches, bridges, and other public works, and for other purposes which it is unnecessary to enumerate-but also, as in England, all objects having any analogy to such uses, would be regarded as charitable. Lord Cranworth said in the case of the University of London v. Yarrow. 26 L. J. Ch. 430, that every object beneficial to the community is a charity in the legal sense of the term; it is wide enough, at all events, to comprise gifts for the support and diffusion among men of every kind of religion, provided it be not immoral, or cruel, or otherwise against public policy. It was held, for instance, by Lord Romilly, that a legacy to print and propagate the writings of Johanna Southcote was a good charity, as, however foolish they might be deemed by most persons, they were neither immoral nor irreligious, and were designed by the testator to confer a benefit on the community, Thornton v. Howe, 31. L. J. Ch. 767; and I do not doubt that the validity of a bequest for the maintenance or propagation of any Oriental creed, or for building a temple or mosque, or for setting up or adorning an idol, as in

an Indian case mentioned by Mr. Woods, would be determined in this Court on the same principle, and with the widest r gard to the religious opinions and feeling of the various Eastern races established here. I make these remarks, not because they are necessary to the decision of this case, but to guard against my present judgment being misunderstood as questioning the validity of any Eastern charity. In the case before me, however, the devise is plainly not charitable; it has not any charitable object whatever. whether general or special, in the sense of a benefit to any living being. Its object is solely for the benefit of the testator himself; and although the descendants are supposed incidently to derive from the performance of the Sin Chew ceremony the advantage of pleasing God and escaping the danger of being haunted, those advantages are obviously not the object of the testator, nor if they were, would they be of such a character as to bring the devise within the designation of charitable, as used in our Courts in reference to such subjects.

But if the devise is not a charity, on what ground can it be supported? It is clear that in England it would be void. In West v. Shuttleworth, 2 M. and K. 684. Lord Cottenham held that bequests to Roman Catholic priests and chapels. in order that the testatrix and her deceased husband might have the benefit of their prayers and masses, were void, and the same question has been since decided in the same way in Heath v. Chapman, 23 L J. Ch. 947, and Blundell's Trusts in 31 L. J. Ch. 52. As Lord Cottenham observed, there was nothing of charity in their object; they were not intended for the benefit of the priests personally or for the support of the chapels for general purposes; and they could not, therefore, be supported as charitable bequests. is true, the legacies are in all those cases spoken of as void because super-titions; but as Sir W. Grant observed in Cary v. Abbot, 7 Ves. 495, there is no statute making superstitious uses or bequests void generally. The statute of 1 Ed. 6 c. 14 relates only to superstitions uses of a particular description then existing, and the 23 Hen. 8 c. 10, which was intended to guard against the loss suffered by feudal superiors through alienations in mortmain, rather than to check the spread of superstition, relates only to assurances of land to churches, chapels, and corporate or quasi corporate bodies, for longer terms than twenty years. Besides, when West v. Shuttleworth was decided, the dogmas and practices of the Roman Catholic religion had ceased to be superstitious in the eye of the law. The 2 & 3 W. 3 c. 115, had placed it on the same footing as other forms of Christianity dissenting

from the established one, in respect of their schools, places of worship, and charities; and a bequest for the repair of a Roman Catholic chapel, or the propagation of the Roman Catholic religion, was as valid as one for repairing a Protestant Parish Church, or spreading the Protestant faith De Windt v. De Windt, 23 L J. Ch. 776. Bradshaw v. Tasker, 2 M. & K. 221. Lord Cottenham, indeed, referring to some early authorities collected in Duke on Charitable Uses, observed that the Act of Ed. 6, had been considered as establishing that legacies to priests to pray for the soul of the donor were within the superstitious uses intended to be suppressed by that statute; but the effect of his decision was that they did not fall within that Act: for if they had, the illegal legacies would have been forfeited to the Crown, instead of being, as they were, held distributable among the next of kin. But, however, this may be, it seems to me that all such legacies, whether they be designated superstitions or otherwise are void upon another ground, viz., that not being for a public or quasi public benefit, they attempt to create a perpetuity. On this ground, a legacy to keep in repair the testator's tomb has been repeatedly held void, Rickards v. Robson, 31 L J. Ch. 897, Lloyd v. Lloyd, 21 L. J. Ch. 598, Fowler v. Fowler, 33 L. J. Ch. 674, Hoare v. Osborne, 35 L. J. Ch. 345. On the same ground, a devise of and to the trustees of a library established and kept up for purchasing and preserving books for the subscribers, was held void. Carne v. Long, 29 L. J. Ch. 503; and Lord Campbell intimated in the case of Thompson v. Shakspere. Id. 278, that a bequest of money to erect and keep up a museum at or near Shakspere's house, as a monument to the poet's memory would be void, "as a perpetuity, not being a charity." These words, indeed comprise the law on the subject. The law of England, as I understand it, does not allow the owner of property, whether real or personal, to dispose of it for all future ages as he desires, except in one case, and that is when his object is of some general benefit to man, or charitable, in the legal sense of the word. He may not settle either money or land on his children or descendants or other persons except for the limited period of lives in being and twenty one years beyond; still less may he devote his property in perpetuity of his own supposed private benefit, or for any other purpose not charitable. On this ground alone, and not because the law condemns as unsound the theological dogma which such a legacy implies, (for the Acts of 23 Hen. 8 and 1. Ed. 6. are not in my opinion, law in these Settlements,) I should consider a bequest for masses for departed souls, void,—and the devise in this case void,

unless the law of these Settlements differs in this respect from the law of England. It remains to consider this question.

In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them. Thus in questions of marriage and divorce, it would be impossible to apply our law to Mahometans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them. Tested by these principles, is the rule of English law which prohibits perpetuities cither of local policy, unsuited to an infant Settlement, or inapplicable by reasons of the harshness of its operation, to people of Oriental races and creeds? The rule is not founded by any Statute, but is a rule of the common law, and it seems to me to be one of a general and fundamental character, of great economical importance, and as well fitted for a young and small community as a great State, for both are interested in keeping property, whether real or personal, as completely as possible an object of commerce, and a productive instrument of the community at large. I am, therefore, of opinion that in this Colony it is not lawful to tie up property and take it out of circulation for all ages, for any purpose not of any real or imaginary advantage to any portion of the community, and if the rule against perpetuities be law here, it might suffice to add that as the property in question in this present case is chiefly if not wholly real, the rule must apply to it invariably, whatever may be the creed, race, or nationality of its owner, on the ground mentioned in Story Conf. L. sect. 440, that it is out of the question to subject property of that nature to any but the local law. and thus introduce in our own jurisprudence the innumerable diversities of foreign laws. But waiving this point, if it be said that such a restriction on the power of impressing on property the will of its present owner in perpetuam, is unjust or oppressive to the natives of the East, I should desire some proof or illustration of such an effect. There is I believe, nothing in Chinese law, or customs-certainly, I have had no evidence of it-which requires the owner of property to dispose of any part of it for the use of his own soul after death. It has not even been shewn that such a devise would be valid in China, or indeed that the power of testamentary disposition is known there at all. No similar devise appears to have been ever brought under the cognizance of the

Court of these Settlements, though one of them, Penang, † has been under British rule and inhabited by Chinese for upwards of eighty years; and surely if a devise in fee for the use of the testal tor's soul was dictated by some imperative religious obligation, the question now before me would have been raised and decided long ago. Certainly it would require very strong evidence to establish that it was regarded as a duty, in any religion, to disregard the claims of natural affection, and, as in this case, to dispose of the bulk of one's property in providing for the supposed benefit and comfort of his own soul, while he left his sons and daughters almost wholly unprovided for. As there is no such evidence, I am unable to see any reason for holding that the rule against perpetuities is less applicable to property in the hands of a Chinese and a Buddhist than to property in the hands of an Englishman and a Christian and I think that the former has no power to devise or bequeath property to be devoted in sæcula sæculorum to any purpose not charitable.

For these reasons, I think this devise void, and that the property is distributable among the testator's next of kin living at his death.

<sup>†</sup> Sinchew is a custom well known in Penang and practised there amongst the Chinese, but upon a very limited scale.



Gov. Gazette, 10th June, 1870.

In the Supreme Court of the Straits Settlements.

### DIVISION OF SINGAPORE.

. The 30th day of May A. D. 1870.

The Court doth hereby appoint the Senior Magistrate of the Straits Settlements, the Commissioner of the Court of Requests at Singapore, the Magistrate of Police of Singapore, and the Registrar and his Senior Sworn Clerk of this Division of the Court, respectively, to be ex-officio permanent Commissioners at Singapore to take the acknowledgments of Deeds of married women, under the Indian Act XXXI of 1854, and the Registrar is directed to cause the said appointments to be published in the Government Gazette of the Colony.

By Order of the Court.

C. BAUMGARTEN,

Registrar.

## BEFORE SIR P. B. MAXWELL, C. J. BAUMGARTEN V. KRAAL.

Where property was seized and sold under an execution from an inferior Court, and after seizure but before sale the same property was seized by the Sheriff on a Writ of Sequestration:—HELD, that the Sheriff could not maintain an action against the officer of the inferior Court for wrongfully selling more than was sufficient to cover the execution and for not paying over such surplus to him.

QUERY.—Whether such an action is maintainable by the party suing out the Sequestration?

Property seized under a Writ, whether right or wring, is in custodia legis and cannot be seized under another Writ, as long as that seizure last.

Straits Times, August 6th, 1870.

The following judgment was delivered by the Chief Justice on Monday, the 1st instant.

The facts of this case are somewhat singular. About noon on the 31st of May, the defendant, who is the Bailiff of the Court of Requests, received two Writs for execution, and he proceeded at once to the premises of the judgment debtor, in the Town. The amount due on the two Writs was \$ 75, and the landlord made a claim for \$ 55 more. The Bailiff seized goods which he afterwards sold by auction for \$671, so that it is clear that he seized a much larger quantity than he ought. He left men in possession of the whole. About 4 P. M., the plaintiff, who is the Sheriff of Singapore, went to the same premises with a Writ of Sequestration which had been placed in his hands for execution two hours before, and putting a seal on two or three articles, declared that he seized them and everything else in the house. He, too, left men on the premises, but without molesting the Bailiff's men in the possession of the goods. On the 10th of June the Bailiff began to sell, and as he had received, on the 1st of June, twelve Writs more in execution of judgments recovered in the Court of Requests, he sold all the goods which he had seized and applied the whole of the proceeds in payment of those debts as well as the earlier claims. Under these circumstances, the Sheriff has brought an action against him, and the question which I have to decide is whether he has any good cause of action; for though the action is, in form, in trover, for the wrongful conversion of the goods, it was agreed that judgment should be given for the plaintiff, if he had any legal ground of complaint against the Bailiff of the Court of Requests.

It is laid down that only such a quantity of goods should be seized as is reasonably sufficient to satisfy the debt and costs; and it is clear that in this case the defendant seized far more than

enough to satisfy the two Writs in his hands for execution at the time of seizure, and the landlord's; but even if the defendant is liable to somebody in some form of proceeding for seizing more than he ought, does it follow that the plaintiff is entitled to maintain an action for damages against him for the excessive seizure or sale? In seizing more than he ought, he does not appear to me to be a trespasser in respect of the excess. It has been held. indeed, that the owner of the goods may sue him for selling more than was necessary, for though he could not know exactly what quantity to sell, he must know when he sold enough, (Batchelor v. Vyse, 4 Moo. & Sc. 552) it has never been held that they were recoverable from the purchaser, as they would be if the Sheriff or Bailiff had not by seizure acquired the legal right to self, but were a mere trespasser. But further, if more goods than enough are seized, it seems to me that by the seizure they all are nevertheless equally in custodia legis. It is not only goods rightly seized that are under the custody of the law; the goods of A. seized by mistake in an execution against B are as much in the custody of the law as those rightly seized, and their owner would be liable to an attachment for a contempt of Court, if he took them out of the officer's possession (Cooper v. Asprey. 32 L. J., Q B, 209) Fieri non debuit, factum valet. The goods in question, then, were not seizable by the plaintiff. His entry on the premises and his declaration that he seized all the goods therein, when they were already in the actual possession of the defendant, was either a rescue or an idle ceremony: in neither case did he acquire any right or power over them, nor did any cause of action accrue to him by the sale. It was contended that, as the defendant had notice of the Sequestration, he was bound to make over to the plaintiff the surplus proceeds of the sale, just as he was bound to pay the landlord's rent. But I do not think that any such duty was imposed upon him, or indeed that he had power to sell for any purpose except the satisfaction of the Writs delivered to him for execution by virtue of his office, and the claims of the landlord. which he is expressly required by statute to satisfy. It seems to me that the plaintiff cannot maintain any action against the defendant in respect of his seizure or sale. He sustained no legal wrong from it. As the goods of the debtor were in the custody of the law, and he could not seize them, he had simply to return that there were no goods seizable under the Sequestration. If any person was damnified by the sale, it was the party who sued out the Sequestration, if his claim in respect of which it was issued is well founded; but whether he is entitled to maintain an action

against the defendant is a question which cannot be determined in this case. There must be judgment for the defendant.

## BEFORE SIR P. B. MAXWELL, Chief Justice.

An instrument in the following terms. "Received from J. S. 200 Dollars on account of a piece of land sold by me to him, measuring fifty long, and about four hundred feet wide," signed by the defendant, and having an agreement stamp on it, is a sufficient note or memorandum in writing to satisfy the Statute of Frauds, on which a Court of Equity will decree specific performance. The word "fifty" in such instrument agrees with the substantive "feet" subsequently mentioned, and must mean, fifty feet.

Extrinsic evidence is always admissible to shew what is the property which is the subject of the contract as such evidence does not vary or contradict the in-

strument, but merely applies it to its subject.

SEMBLE.—Part payment of the purchase money is not a sufficient part performance to enable a Court of Equity to enforce the specific performance of a verbal contract.

QUERY.—Whether payment of the whole of the money or in other words, the complete performance of the contract by the purchaser, is a sufficient part performance to entitle him to have a verbal contract enforced? (a)

Straits Times, 27TH JANUARY, 1871.

THE CHIEF JUSTICE - This suit seeks a specific performance of a contract under the following circumstances. The plaintiff and defendant agreed that the latter should sell to the former, for 200 Dollars, a piece of land fifty feet wide, and extending from the plaintiff's garden to the highway, a distance which they estimated at four hundred feet. It included a footpath which it was the plaintiff's object to widen into a carriage road. Shortly after this verbal agreement, the plaintiff paid the purchase money, and the defendant gave him a receipt in the following terms: "Received from J. S. 200 Dollars on account of a piece of land sold by me to him, measuring fifty long and about four hundred feet wide."-When called upon for a conveyance, the defendant contended that the fifty feet were to be measured by the human foot and not by the ordinary legal measure. He had made the same assertion when the receipt was being written. In the witness box, he further asserted that the piece of land lay in a different direction, not extending to the highway, and the four hundred feet lying parallel with the plaintiff's boundary, and not at right angles to it.

The question is, whether the Court will enforce this contract, it being contended that there was no sufficient contract, or note, or memorandum thereof in writing, as required by the Statute of Frauds. In the first place, it may be doubted whether any writ-

<sup>(</sup>a.) No—see Notes to Leyster v. Foxcroft, 2 Wh. & T. Leading Cases in Eq. p.

ing is necessary in this case, for a Court of Equity to enforce the specific performance of a verbal contract when there has been a part performance of it. It is true, part payment of the purchase money is not a sufficient part performance for this purpose, but it has never been decided that the payment of the whole of the money, or in other words the complete performance of the contract by the purchaser, is not sufficient to entitle him to have the contract enforced. Lord St. Leonards, refers, in his work on Vendors and Purchasers, to a dictum to the effect that even payment of the whole purchase money is not enough, but his own opinion is that "it would be difficult to refuse specific performance where the purchaser has paid all the purchase money." (a.)

It is not necessary, however, to decide the case on this ground, for I think that there is a sufficient note or memorandum of the agreement signed by the party to be charged therewith, i. e., the defendant.—Mr. Rodyk contended that a mere receipt of the money was not sufficient for this purpose, and unquestionably it could not be seriously asserted that that paper was intended by either part to embody the terms of their contract. But in point of fact, it does embody them. It states the vendor and the purchaser's names, the price, and the piece of land sold: and it was decided in the case of Evans v. Protheroe (21 L. J. Ch.) cited by the Attorney General, that a receipt, stamped with an agreement stamp, as this is, was a sufficient note to satisfy the Statute. The authority of this case was questioned, but it is unnecessary for me to express any opinion upon it, it is enough that it is a decision of the Lord Chancellor; and I am bound by it.

It was contended, however, that even in this view, the document was insufficient, first, because it did not state where the land was, and next because it did not state the width of the land—it being uncertain whether fifty referred to feet or yards or any other measure. On this latter point, I think, that it is no undue stretch of construction, or any violation of the rules of grammar, to hold that the adjective fifty agrees with the substantive feet, which follows the words four hundred. If the agreement had said that the land was fifty feet wide and four hundred long, it would hardly have been disputed that four hundred feet were meant,—that the four hundred agreed with the preceding substantive feet. It is true, this latter arrangement of the words would have been more agreeable to the genius of our language;

<sup>(</sup>a.) No specific performance will be decreed, as the purchaser can obtain the money by an action for money had and received. See Sm. Man. of Eq. 250.

but still, I think, that on strict grammatical principles the word "fifty" must be taken to agree with "feet" which follows "four hundred."

As to the situation of the land, it is a well known rule that extrinsic evidence is always admissible to shew what is the property which is the subject of the contract. Such evidence does not vary or contradict the instrument, but merely applies it to its subject. On this ground, therefore, all the evidence which was admitted on the subject of the verbal agreement and the acts of the parties was properly admissible. It is true, the land was not marked out and specified by boundaries; but according to Lord Bacon, in commenting on the maxim "ambiguitas verborum verificatione suppletur," "if I grant ten acres of wood where I have a hundred, the grantee may elect which ten he will take; ' and in this case, consequently, the plaintiff would have the right to select any part of the defendant's land. But his right is limited by the evidence which shews that the pathway runs over the land which was the subject of the sale. I think that he is entitled to have any piece of land of the defendant's fifty feet wide which comprises within its limits the footpath and extends to the road.

With respect to the measurement of the fifty feet, nothing was said at the time of the verbal agreement, and nothing is mentioned in the memorandum, as to what kind of foot was intended, I think, therefore, that the known measure was meant. As to the assertion made by the defendant at the time when the receipt was written, it is enough to observe that, that was merely the construction or gloss which he proposed to put upon the terms of the agreement which had been entered into several days before, and it cannot vary the meaning of the language used at the time of the contract, or in the written paper.

Specific performance decreed.

30TH APRIL 1872.

BEFORE HIS HONOR T. SIDGREAVES, \* Chief Justice.
In the matter of Ahamado Bawa.

The first part of the 40th section of Act. V. of 1868, (the Supreme Court Ordinance,) on the principle "Expressio unius est exclusio alterius," must be read as if it excluded all persons not specifically mentioned therein.

The words "persons of good repute" in the second part of the section must be construed strictly, and it is necessary for an applicant under that part of the section, above all things, to give by the evidence of others, the most unexceptionable certificates of character.

THE CHIEF JUSTICE.—I had some doubt at first, to whether I ought not to have remitted the Petitioner in this case to Penang, in-

<sup>\*</sup> Knighted, February 4th, 1874.

as-much as it was in the Supreme Court of that Division that he filed his Petition in the first instance, and it was before the learned Judge of that Court that the matter was first of all enquired into and to some extent disposed of. Had I considered this Petition was in any way meant to impugn that decision or to obtain a new hearing, I should have declined to entertain the Petition at all. The fact, however, that the Petitioner came to Singapore in the first instance shows that he intended to present his Petition here originally, and was only prevented from doing so by the fact that at that time there was no Chief Justice here, and that the Acting Chief Justice was at Penang. At the time of the presentation of his Petition at Penang he had not resided in the Settlement for the three months required by the Rules, and it was principally upon that ground, and without going into the merits of the case, that his Petition was dismissed. He presents his Petition here, however, after having completed three months residence in expressing his willingness to submit to an examination if necessary. I think. therefore, that without any discourtesy to my learned condiutor Sir William Hackett, I may look upon this as an original Petition filed in my Division of the Court and deal with it accordingly. The Petitioner certainly opens up questions of very considerable importance to all who are practising or who expect to practice as Advocates of this Court, and the manner in which the questions are brought before the Court and the circumstances under which they are brought, are of a somewhat extraordinary character. The Petitioner comes here from Ceylon, where he has been, as he says, and there is no reason upon that point to doubt his assertion, a Proctor of the Supreme Court, and he claims to be admitted here on the ground of his professional status, as a member of the Bar of the Supreme Court of the Straits Settlements. Now it is impossible to suppose that the Petitioner being a lawyer, or any body else in fact contemplating such a step as the Petitioner contemplated, viz., leaving his practise in Ceylon and coming over to Singapore to apply for admission amongst the Bar of the Supreme Court of the Straits Settlements, would not before doing so obtain and examine the regulations which governed the admission of Advocates and Attornies of that Bar-common prudence would have dictated that. If he had obtained those regulations and perused them, he must have seen that that admission was regulated by the 40th Section of the Supreme Court Act, which provides that "It shall be lawful for the Court to admit and enrol such and so many persons as have been admitted Barristers at Law or Advocates in Great Britain or Ireland, or have been admitted Attor-

nies, Solicitors, or Writers in one of the Superior Courts at Westminster, Dublin, or Edinburgh, or have been admitted as Proctors in any Ecclesiastical Court in England." Now, I said on Monday and I say again now : that on the principle "Expressio unius est exclusio alterius," those words must be read as if they excluded all persons not specifically mentioned therein, and amongst the persons not specifically mentioned are "Proctors of the Supreme Court of Ceylon." (a) The Petitioner went into a very long argument to shew that the Ordinance did not say what it meant and did not mean what it said. He argued that because by the 20th and 21st Vic. c. 39, Attornies and Solicitors of the Courts of certain Colonies and Dependencies were upon certain conditions eligible for admission to the Superior Courts of England, that a Proctor of Ceylon must have been meant to be included in the words "Attorney and Solicitor," that Ceylon came within the purview of the Act-that a Proctor of Ceylon might go to England and be enrolled as Attorney of the Superior Courts of England, and that therefore a Proctor of Ceylon was equal to an Attorneyof Great Britain. He also contended that a member of the Bar here might go to England and be admitted as an Attorney, and that therefore he was put on the same footing as a Proctor of Cevlon, that is, they were both equal to an English Attorney: that things which are equal to the same thing are equal to each other. and that therefore a Proctor of Ceylon was equal to a member of the Bar of the Supreme Court, and that it would be an injustice to exclude him from practising as such. This is, as nearly as I could gather, the argument made use of by the Petitioner, and I merely mention it, in order to show to what shifts he was driven. in order to evade the plain meaning of an Ordinance and to substantiate his claim on the ground of status. Of course, it must not by any means be assumed, that I accepted his interpretation of the Act referred to. He must have known this before he left Ceylon. Being a Lawyer, he must have known, that there was not a shadow of a pretence for supposing, that a Proctor of the Supreme Court of Ceylon was by virtue of his status, eligible for admission to the Bar over which I have the honor to preside. He must have seen that his only possible chance of admission depended upon the construction which might be placed upon the 2nd part of the 40th Section. That part of the Section gives power to the Court to admit any "persons of good repute" not previously admitted as aforesaid, subject to certain conditions. The Petitioner says, "If I am not admissible under the 1st part of the

<sup>(</sup>a.) See Morgan vs. Leach, 2 Moore Ind. App. 428.

Section, then I am admissible under the 2nd part." But why? "Because I am a Proctor of the Supreme Court of Ceylon." That is to say, being inadmissible under the first part of the Section as a Proctor of Ceylon, he claims to be admitted by virtue of that Proctorship under the 2nd portion of that Section. not lay his claim upon any other ground so far as I can understand, but impliedly argues that the words "persons of good repute" must be construed to include a Proctor of the Supreme Court of Ceylon. He has certainly not attempted to show the Court in any other way, that he comes within the meaning of those words. He has not produced one single Testimonial or Certificate of character from Ceylon nor has he accounted for his leaving it, except by giving us long and irrelevant details respecting his domestic life, and informing us that for certain reasons he was disliked by the Mahomedans of Ceylon. Even if these matters were pertinent, which they are not, and even if this Court could be turned, as I trust it never will be, into a refuge for the destitute-we have nobody's word for the Petitioner's statement except that of the Petitioner himself. "Nemo judex in sua causa," and the last person in the world who should expect his statement to be taken for granted in a Court of Justice, without the production of any evidence, is a Lawyer. But the Petitioner explains in a manner how it is that he is totally devoid of testimonials from Ceylon. He says, that he could have brought plenty from natives, but then the Attorney General would not have attached any importance to anything coming from the natives, and that therefore there was no use in bringing them. Immediately afterwards, however, he says that the Attorney General was quite unknown in Ceylon, so that that motive could hardly have actuated him, when he was considering whether or no he should get Testimonials from the natives. He says, again, if he did bring Testimonials to whom was he to present them? There was no Chief Justice at the time in Singapore, and the existence of the Attorney General was unknown in Ceylon. The question is, not to whom he was to present them, but from whom he was to bring them, and to say that he did not bring them because there was nobody to give them to, is so bad an excuse, that of itself it excites suspicion. He says in the same breath, that he endeavoured to make his arrival at Singapore correspond as nearly as he could with the arrival of the Chief Justice from England. He came here expressly to present a petition to the Judge, and that the reason why he did not bring Testimonials was, because there was no Judge to present them to. But the Petitioner goes beyond this. He says, that he has given the Singapore Bar an ample opportunity of finding out whether he

was an impostor, and that it is not to be supposed that they have not strained every nerve to find out any thing to his prejudice. I am very much afraid that the Bar have not taken quite such an interest in the matter as the Petitioner seemed to think that they must have done; I do not think that any member of the Bar has taken the least trouble to try and find out anything either to his prejudice or to his credit. At the expiration of the month's notice, I consulted the Attorney General as to the feeling of the Bar upon the subject and this was the first time the subject had ever been mentioned by me to any member of the Bar, or that any member of the Bar had mentioned the subject to me. The Attorney General told me, that the Bar knew nothing at all about the Petitioner, one way or the other, and that they were absolutely without the means of knowing anything about him. He suggested to me, or I suggested to him, I really forget which, that he should call a Meeting of the Bar to consider the matter. This was done, and I received a communication in due course from the Attorney General informing me that he was authorized by the Bar to oppose the admission of the Petitioner upon certain grounds which were stated. This is the "organized opposition" of which the Pititioner has complained so much, and for which, if any body is responsible, I am responsible myself. If it would have been possible to have entertained his application for admission under the second clause of the 40th section, it would have been necessary for him above all things to have given by the evidence of others the most unexceptionable certificates of character, including at all events, one from the presiding Judge of the Supreme Court of Cevlon. It must not go forth, however, that any person even armed with the most unquestionable Testimonials would be successful in his application for admission here. The Bar is not a business; it is a profession, and a high and honourable profession too. It depends upon conservation for its very existence, and it is guarded in the mother country by Regulations so stringent, that to the uninitiated they seem almost absurd. What is the practise in England-a practice sanctioned by the usage of centuries, and having all the effect of a binding law? A Barrister when he is called to the Bar makes choice of a circuit, and he is allowed three before making his final decision. After that period he is not allowed to change. He may receive the most friendly overtures from another circuit; he may lose all his practice or all his friends upon his own-but the portals of every other circuit are for ever closed to him after he has once made his final election. If this has been found to be necessary for the preservation of the Bar itself in

England where Barristers are known, and where everything about them is known how much more necessary must it be in the Colonies, that the Bar of one Colony should be guarded from the invasion of persons utterly unknown to them from another. If the principle for which the Petitioner contends to be admitted .- that an Advocate should be allowed to take his goods to the best market, then we might say farewell to the Bar as an honourable pro-If disappointed practitioners or needy adventurers might roam from Colony to Colony endeavouring to disturb the practice of those long 'settled in the place-men who have given hostages for their good conduct, and who look to the approval of their fellow-citizens quite as much as to the pecuniary gains which they obtain from their profession, then the degradation of a profession which now stands second to none, would be imminent. If the Pelitioner has been induced to come to Singapore by false hopes being held out to him, I am very sorry for him, certainly no person of any knowledge or of any authority could have held out such hopes, and if he has been induced by the opinion of persons without knowledge or authority, he can hardly lay the blame at any body's door but his own. It is idle to suppose that a small section of the population here cannot get justice without the intervention of the Petitioner, because he is able to converse with them in their own language. If that were absolutely necessary, a native Judge should occupy this Bench, or rather as many native Judges as there are varying nationalities, and the great work of impressing English notions of justice which is even-handed and impartial, and which they have begun to recognize as such, would be entirely frustrated. There is no greater difficulty in this small section making their wants known than attaches to any other members of the community. To whatever class or to whatever race a suitor in this Court belongs, he will always receive, and I believe always has received, as much consideration, and have the same measure of justice meted out to him, as the most flourishing European in the Straits Settlements. It is not, however, by encouraging, but by preventing litigation that their interest will be best consulted. An enlarged Bar struggling for practice would be a serious evil to the Colony, and it would be an evil that would be most of all felt by those who are at least able to protect themselves.

Holding, as I do, that the Petitioner has entirely failed to make out his case, I have no other course left but to dismiss his Petition.

EX0(2)

#### BEFORE HIS HONOR THOMAS SIDGREAVES, Chief Justice.

REG. vs. 0——— and F———.
Motion in arrest of Judgment. Construction of Statutes.

The Prisoners were convicted for embezzlement, but before sentence the Counsel for the prisoner moved for an arrest of judgment, on the ground that the Act under which they had been tried had been repealed:—HELD (on leave reserved) that the Act XIII of 1850 upon which they were convicted, was still in force here and that the words "British India" in the Act XVII of 1862, which repealed the said Act, did not include the Straits Settlements and the Conviction was affirmed.

Daily Times, - December, 1872.

The following JUDGMENT was delivered on the 16th instant, by the CHIEF JUSTICE.

In this case the Prisoners were tried before me at Malacca, and convicted of Embezzlement. Before sentence, Mr. Davidson, acting as Counsel for the prisoner O———, moved an arrest of judgment on the ground that the Statute creating the offence,—Act 13 of 1850,—had been repealed by Act 17 of 1862.

I proceeded to pass sentence, reserving to Mr. Davidson leave to move before me at Singapore, which he accordingly did, the Attorney General appearing on behalf of the Crown. If Mr. Davidson's contention be right, the consequences would be not only that this conviction is wrong, but that all the convictions obtained under it for the last ten years, during all which period the Act has been acted upon, have been wrong also.

It becomes important, then, to consider whether Act 13 of 1850 has been repealed so far as the Straits Settlements are concerned or not.

The first Section of Act 17 of 1862, upon which Mr. Davidson relies, is as follows:—

"The several Regulations and Acts set forth in the Schedule hereunto an"nexed, so far as they provide for the punishment of offences, shall be held
"to have been, and are hereby, repealed from the 1st of January, 1862, in
"the Presidencies of Bengal, Madras, and Bombay, and in the other parts
"of British India, in which such Regulations and Acts or any of them were
"in force on the said 1st of January, 1862, except in so far as they repeal
"the whole or any other part of any other Regulation or Act, and except as
"to any offence committed before the said 1st of January, 1862."

Now, amongst the several Regulations and Acts, set out in the Schedule, we find this Act No. 13 of 1850, and the extent of the Repeal is stated to be the whole Act. If the Straits Settlements come then under the general words of Section 1st, it is obvious that the Act has been repealed.

Mr. Davidson's contention is, that they do come within those words, that those words are perfectly clear, and that being clear and unambiguous, we cannot look at the Preamble to explain them.

In the cases which he quoted, however, the real state of the law upon the subject was made abundantly clear, and it must be taken that although a clear and express enactment cannot be controlled by the Preamble, yet if there be any doubt upon the subject, the Preamble may be referred to for the purpose of shedding a light upon it. It must be taken also, that in construing an Act, the Court is entitled to consider the whole scope of it, in order to arrive, at the meaning of any particular enactment.

In the Sussex Peerage case, 8 Jur: 793, where the question turned entirely upon the construction of a Statute,—The Royal Marriage Act,—Lord C. J. Tindal, delivering the opinion of the Judges who had been called in by the Lord Chancellor to advise the House of Lords says,

"The rule for the construction of Statutes is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do in such case best declare the intention of the Law-givers. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the Statute and to have recourse to the Preamble, which according to Chief Justice Dyer, is a Key to open the minds of the makers of the Act and the mischiefs which they intended to redress."

In Attorney-General v. Powis, 1 Kay 186, it is stated that in construing an Act the Court is at liberty to regard the state of the law at the time, and the facts which the Preamble or recitals of the Act prove to have been the existing circumstances at the time of its preparation.

Now with regard to Sec. 1st of the Act 17 of 1862, it was contended by Mr. Davidson that the Court was bound to give effect to the words as they stood. and that the words, "in the Presidencies of Bengal, Madras, and Bombay, and in the other parts of British India in which such Regulations and Acts were in force," clearly include the Straits Settlements. But looking at the words "British India," and knowing that the words are used in different senses in different Acts, we are surely entitled to know in what sense the Legislature intended to use them here, and even if the Straits Settlements were at that time a portion of the Presidency of Bengal, were they so for all purposes of the Act? We refer to the Key which has been mentioned, the Preamble, in order to open the minds of the makers of the Act, and there we find the reason why the Act was passed. It was because a Penal Code had come into operation in British India and a Criminal Procedure Code come into operation in the Presidencies of Bengal, Madras and Bombay, and was at the same time, or had since, or might thereafter be, extended to 'other parts of British India. Now here we have the very same terms used as in first Section. "British India" and "the Presidencies of Bengal, Madras, and Bombay." Do these terms include the Straits Settlements? The two Codes each contain a definition of what is meant by "British India," both to the same effect,the words "British India" shall denote the territories that are, or shall become, vested in Her Majesty by the Statute 21 and 22 Vic. C. 106 entitled " an Act for the better Government of India, except the Settlements of Prince of Wales Island, Singapore and Malacca."

It is quite clear, therefore, that the Act never contemplated the introduction of these two Codes into the Straits Settlements, and the 3rd Section shows that the intention of the Legislature was that the Acts in the Schedule should be repealed in other parts of British India, at the same time that the Codes were introduced into them.

The Code of Criminal Procedure never came into operation here, and, even if it did. it could not have affected this Court, which was a Court founded by Royal Charter, and the Penal Code expressly excepts these Settlements. Giving the same words the same signification in the 1st Section, I am of opinion,

therefore, that they do not affect the Straits Settlements, and that the Act 13 of 1850, is still in force within these Settlements. The motion in Arrest of Judgment will therefore be dismissed and the Judgment will stand.

- see

BEFORE HIS HONOR SIR THOMAS SIDGREAVES, Kt.. Chief Justice.

HAJEE MAHOMED ARSAD.—Appellant,

Vs.

Captain S. Dunlop, Acting Inspector General of Police, S. S.—Respondent.

In a case against the owner of a house or premises for permitting it to be used as a Common Gaming House under Ordinance XIII of 1870, (a.) and in which certain appliances and contrivances, mentioned in Section 15. are found—nothing but a mere presumption arises against him that it was so used by his permission, which he may rebut by evidence. The Magistrate must be satisfied of the Defendant's "guilty knowledge," (b) before he can convict.

Straits Times, -July, 1874.

JUDGMENT was delivered on the 1st instant, by the CHIEF JUSTICE.

This was an Appeal from the decision of the Police Magistrate in Singapore, in regard to a conviction by him of the Appellant "for that he the said Hajee Mahomed Arsad, being owner of House No. 39, New Bridge Road, in Singapore aforesaid, permitted the same to be kept and used as a Common Gaming house, and has thereby committed an offence punishable under Sec. 3, Clause 2, of the Gaming Houses Ordinance of 1870," the punishment imposed being a fine of \$1,000.

Mr. Donaldson appeared for the Appellant, nobody appeared on behalf of the Respondent.

In this case the question mainly turned upon the proper construction of the 15th Sec. of Ordinance 13 of 1870, which is as follows:—

"Whenever any passago, staircase or means of access, in a place lawfully entered as aforesaid, to any part thereof is unusually narrow or steep or otherwise difficult to pass, or any part of the premises is provided with unusual or unusually numerous means for preventing or obstructing an entry or with unusual contrivances for enabling persons therein to see or ascertain the approach or entry of persons, or for giving the alarm or for facilitating escape from the premises, it shall be presumed until the contrary is shown that the place is a gaming house, that the same is so kept or used by the occupier thereof, and that it is so kept with the permission of the owner thereof."

By the 3rd Sec. of the same Ordinance, amongst other offences therein defined, whoever permits a place of which he is owner or occupier to be kept or used by another person for the purpose of

<sup>(</sup>c.) Now Ordinance IX of 1876. (b.) See Tan Tok Lee vs. Hat, ante p. 386.

carrying on the business of a common gaming house, shall be punishable with a fine not exceeding \$ 3,000, or with imprisonment with or without hard labour not exceeding 12 months. At the hearing before the Magistrate, Mr. Donaldson on the part of the Defendant, the now Appellant, admitted that he was the proprietor of the house in question. Evidence was then given with regard to the fitting up of the house with appliances for gaming. Mr. Maxwell, the Superintendent of Police, says in his deposition, "I went to house No. 39, I entered a narrow passage not very long, it was about the length of the breadth of this Court. end of the passage there was a narrow flight of stairs, at the top of which was a trap-door, I ran up the stairs and tried to force open the trap-door but could not. I heard the sound of people escaping over the roof. I tried to enter the house and those next to it, but could not. I sent a constable to the front window of this house and he effected his entrance by cutting a bar, he then opened the trap-door and I entered the room on the first floor." In that room Mr. Maxwell found articles which clearly proved that gambling has been carried on. He found two broad ladders leading from the gambling room directly to the roof, and it was quite clear that the gamblers had effected their escape across the roof. He says. "There was nothing in the construction of the house different from others except the ladders." Capt Dunlop, the Acting Inspector General of Police, gave similar evidence, adding "In the gaming room was a stool on which a watchman sits while the gambling is going on, in readiness to let fall the trap-door when an alarm is given."

Inspector Kraal stated, that he had been watching the house for a month previous to the day on which it was entered. He stated in his evidence that, no one but Chinese, except they had special knowledge, would know it was a gaming house. It being an empty house and seeing many people frequent it might make one

think it must be a gaming house.

No evidence was given nor attempted to be given that the Appellant had any knowledge directly or indirectly that the house

had been so used as a gaming house.

At the close of the case for the prosecution, the case states, "Mr. Donaldson applies for the Magistrate's opinion in the case, and the Magistrate decides that it is a gaming house and that according to the provisions of the 15th Sec. of the Gaming Houses Ordinance No. 13 of 1870, it was so kept with the permission of the owner thereof."

I regret very much that no one was instructed to appear on behalf of the Respondent: it would have been a great assistance to the Court to have had the views of the Police Magistrate explained, and the reasons which induced him to convict the Appellant

commented upon and supported. This would have been the more desirable, in-as-much as it is difficult to gather from the case whether at this stage the Magistrate considered that under the 15th Section he was bound to convict, or whether he considered that the onus of disproving knowledge on the part of the Appellant, of his house being used as it had been proved to have been as a Gaming House, was then cast upon him.

I have no hesitation whatever in saying, that the first position, is untenable. It must be remembered, that this is a highly Penal Ordinance, and Penal Ordinances as well as Statutes must be construed strictly. The result of a conviction to an owner, for permitting his house to be used as a Gambling House, may be simply ruinous; he is liable to be fined \$3,000 or to be sent to prison with hard labour for 12 months.

Assuming the 15th Sec. of the Ordinance to apply to this case, the effect of the evidence for the prosecution was to raise a presumption of knowledge against the Appellant, which he was called upon to rebut. It was therefore absolutely necessary to receive evidence tendered to disprove knowledge on the part of the Appellant and to give due weight to that evidence—the guilty knowledge being the essence of the offence. To rule otherwise would be to make this Ordinance an infringement upon the first principles of English Law, and make this Ordinance null and void as having exceeded the condition upon which the Legislature alone had power to enact it, viz., that it shall not be repugnant to the Law of England.

The evidence of two witnesses, rent collectors to the Appellant, however, was tendered and received. And although it is very difficult to prove a negative, especially in a case where the mouth of the person principally interested is closed, they gave certain evidence negativing such knowledge on the part of the Appellant. It does not appear from the case whether their evidence was deemed insufficient or unnecessary.

It will be understood, that I am not imputing the slightest blame to the Police Magistrate as regards the framing of the case. It has been drawn up entirely in accordance with the provisions of the Ordinance. The question is, as to what construction the Court is to put upon the 15th Sec. And if it means that that which is really no knowledge at all is in law to be deemed knowledge—if the simple fact of there being a trap-door (nothing unusual in this case of houses) and two ladders leading to the roof, is to be deemed conclusive proof of permission on the part of the owner to allow the house to be used as a gaming house, then this

is an Ordinance opposed to the first principles of justice, and one which no Legislature had power to enact. I do not, however, take this to be the meaning of the Section. It expressly states that where the passages, staircases or means of access are unusually narrow or steep, or where the premises are provided with unusually numerous means for preventing or obstructing an entry, or with unusual contrivances for enabling persons to see or ascertain the approach or entry of persons, etc., the presumption will lie. All this points to the conclusion, that the house is to be so fitted up or so guarded in such a palpable and evident manner, that the fact of collusion on the part of the owner of the house with the gamblers therein so using it, is almost irresistibly forced upon us. Even then, however, a presumption only is raised, and it is quite open to the owner to prove, if he can, that all fhis has been done without his knowledge or permission.

The description given by the witnesses for the prosecution shows, that so far from being provided with all these unusual appliances and contrivances, there was nothing unusual about the premises, except a pair of ladders leading from the first floor to the roof. I consider, therefore, that this case does not come within the meaning of the 15th Sec. of the Ordinance, and the adjudication must be reversed.

I feel bound to add, that I look upon this Ordinance as seriously menacing, if not actually invading, the liberty of the subject and the rights of property. It may be of great importance that Gaming Houses should be suppressed in Singapore, but it is of still greater importance that the rights and liberties of British subjects should not be interfered with. In their anxiety to suppress gaming, it would seem as though the framers of this Ordinance had overlooked the elementary principle of English criminal law, that a man is to be considered innocent until he has been found guilty. By this Ordinance, however, creating for the first time an offence and visiting it with a most severe punishment,-passed in terms which would puzzle even a lawyer, and printed in a language which is not understood by one person in a hundred belonging to the community, and which yet, by a fiction of Law, is supposed to be known and understood by every one of them,—the position is reversed, and an accused is deemed guilty until he can prove himself to be innocent. To avoid trouble, the necessity of a prosecution upon a charge involving 12 months imprisonment with hard labour is dispensed with, and the unhappy owner of property is called upon to prove a negative as well as he can, his own mouth being altogether closed.

But this is not all. By the 18th Section, "To every demise and hire of a place made after the passing of this Ordinance, is annexed the condition that the same shall be void if the place demised or hired shall be kept or used as a gaming-house by the lessee or hirer or with his permission. In all legal proceedings to recover possession of the demised or hired place for breach of the said condition, the declaration of a Magistrate required by section 17 shall be prima facie evidence that the place was kept or used as a gaming house by the lessee or hirer or with his permission."

Here, therefore, is an imaginary unwritten condition attached to every demise and hire of a place, of which every owner of property is bound to take cognizance. If he does not, and does not also at once enforce his right to recover possession of the place for breach of the condition, and the place is again "declared" by the Magistrate, "it shall be presumed that the said place was so kept or used with the premission of its owner," and in the Section the words "until the contrary is shown" are omitted. This means, that in the Straits Settlements every owner of property, who does not as soon as a house belonging to him has been declared by a Magistrate to be used as a Gaming House, take steps to eject the tenants, renders himself liable to a fine of \$3,000 or 12 months imprisonment with hard labour.

I doubt very much, whether it is in the power of the Colonial Legislature to harass property with these restrictions, and surround the ownership of property with these perils. The question does not arise at present, but if it is raised, and it is proved to my satisfaction that this is law which is not reasonable in itself and that it is repugnant to the law of England, I shall not hesitate to treat it as an Ordinance, passed "ultra vires," and regard it as a nullity.

#### QUESTION OF COSTS.

The following article is taken from the Penang Gazette of 25th July 1874,—its remarks apply not only to the above decision of a Magistrate but also to all other cases where the Magistrates' Convictions are quashed on Appeal. The Appeal Ordinance IX of 1874, Section 36 provides that, "The Court may," on the decision of any Appeal, direct that the costs of the Appeal shall be payable by either party thereto." Appellant or Respondent!!

There is no post in the Settlement of more importance than that of Police Magistrate. The office, we believe, is clothed with powers considerably more extensive than those committed to London Magistrates, all of whom are selected from the ranks of the legal profession. The jurisdiction of Straits Magistrates extends to 12 months rigorous imprisonment, and they can impose a fine as high as \$ 3000. It is obvious that powers so extensive, unless

skillfully exercised, may be the cause of very great hardships, and possibly ruin to those whose conduct becomes the subject of investigation in the Police Court. The cases too, with which our Magistrates have to deal, are very frequently not a whit less complicated than those committed to the higher Court to be sifted by a learned Judge, aided by Counsel and Jury. To the proper solution of such cases, a plenary knowledge of what constitutes legal evidence, the faculty of long and unremitting concentration of thought and some aptitude for fishing the truth out of human testimony, are doubtless indispensable qualifications. If there is any truth in this, the names, with few exceptions, in the list of newly made Magistrates, give ample cause for doubting whether Government ever seriously reflected on, or is in information sufficient to judge of, what the duties of local Police Magistrates really consist. Even the recent appointments out of the Settlement are not calculated, in our opinion, to lessen this doubt. Is it because we find so little real responsibility attaching to the grossest mistakes of Magistrates, that no test, or guarantee of capacity, is required? In all other public departments of a special nature, a candidate is bound to produce a certificate, or some kind of diploma, before he can hope to obtain employment. To us there appears lamentable inconsistency in providing laws to protect the public from the risk attending the employment of uncertificated legal-practitioners, and yet permitting a large and by no means insignificant portion of the law, to be administered by a medium entirely opposed to the principles upon which only such legislation can be based. If Magistrates, or the State, were to become responsible for decisions not in accordance with evidence or common sense, by which individual loss or suffering is entailed, there might be less concern for the mode in which the former are nominated. But so long as we have cases in which innocent defendants are compelled to incur heavy expenses, in order to get rid of the consequences of palpably erroneous judgments, some alteration in the law by which responsibility would be ensured, appears to be urgently needed. We have been partly led to these remarks by a judgment given by the Chief Justice, which we take from a copy of the Straits Times, and publish in another column, deciding an Appeal, from the Magistrate's Court at Singapore, in favour of the Appellant, who, as landlord simply, had been finded \$ 1000, his tenant having used the premises demised to him, as a common gaming house in contravention of Ordinance No. 13 of 1870. The particulars of the case will be found in his Lordship's judgment. The question with which we are concerned at present is, how are the expenses, amounting in all probability to a third of the heavy fine imposed, incurred by the Appellant in the endeavour to vindicate his character and save his pocket, to be refunded? The Magistrate is protected, and the State is equally beyond reach of the law. That the latter should possess the right either directly, or indirectly by its servants, to entail such a sacrifice upon an innocent person, is an anomalism. There is no reason whatever why the State should not work under the same obligations as private individuals, and be like them amenable in damages for personally injurious acts, when ordinary precaution might have avoided the evil. We are not advocating that the public purse should be made to pay for every inevitable un-right committed in the pursuit either of justice or any other general good. But what we do say is, without any reference to the particular case to which we have alluded, that it is a grave reproach to public justice that no responsibility rests either with the State or Magistrates for radically bad decisions, from whatsoever causes they may arise; and it is to be regretted that generally there is not more thought bestowed in the selection of the individuals to whom is committed so much power of doing mischief as well as good.

SUMMARY SIDE OF THE SUPREME COURT.

Before Sir Thomas Sidgreaves, Chief Justice.

MIANG vs. KUGLEMANN.

If a person contracts to serve another as a servant by the month, and leaves it without notice, he will not be entitled to recover any wages for that month. If a master discharges his servant without just cause, the master will be liable for such wages, even if the servant had served only one day.

straits Times, 17th August, 1876.

The plaintiff claims a month's wages or 12 dollars.

This case was heard before the Chief-Justice on Friday last, and the decision must be satisfactory to the public, as it decides a question, which very many are interested in.

The Defendant employed plaintiff for some time, as a driver of one of his Johore Omnibuses, and he got \$12 per month for this service. He was however a cruel fellow, and so severely whipped one of the horses of the Bus, that his employer was annoyed at the cruelty and brought his conduct to the notice of Major Dunlop, who took him before the Magistrate, and he was justly fined.

After this. Mr. Kuglemann, did not discharge the syce, as he might have sent him away, but ordered him to work in the stablings, as he considered it unsafe to let him drive his horses. This wounded the feelings of the syce, and he left Mr. Kuglemann's service, without any notice, and as he had two other of his relations working in the same stablings, he enticed these fellows, and got them also to leave. Thus beside putting Mr. Kuglemann to much inconvenience, he sent his employer, "an invitation," and wanted a month's salary.

The Defendant pleaded, that the Plaintiff left him suddenly, and put him to much inconvenience, and out of spite, lured away two other syces from his employment. He brought his *Mandor*, or head syce, to prove, that he left without notice, and while in service, the syce was regularly paid and well treated, and had no cause of complaint save that of being degraded, from that of a driver of the Bus, to a syce, who had to groom the horse and confine himself to the stable work.

The Court in giving the decision remarked, that had his employer discharged him, he would have been entitled to claim the wages, and had he served but one day, and after this sent away without any just cause, he would have got a decree for the wages of that month, as the contract was to serve for a month, but remarked the Judge, "you left suddenly because you thought you were degraded, and he set you to a work you were fit for, and you go huffed and left him. The syces here think they can do as they like and leave when they like, this however must be put a stop to." The case was dismissed, and the syce was taught a lesson which may be of service to him.

Gompiled and arranged by S. Leicester,
Printed at the Commercial Press, by HEAP LEE & Co.,

### MALACCA.

JULY 20TH, 1833.

## BEFORE SIR BENJAMIN MALKIN, RECORDER. Inchee Karrim v. Quay Pang.

Construction of the Local Regulation No. III of 1830, providing for the retail of Seree or Betel Leaf within the Towns of Fort Cornwallis, Singapore and Malacca. Held that the Renter of the Seree Farm is bound to purchase all Seree tendered to him at the rate fixed by Government, and that he cannot refuse to do so upon the ground that he is supplied for a day's consumption—and because he was informed by the officers of Government at the time of his bidding for the farm and before the purchase that under the Regulation he was at liberty to reject Seree under such circumstances.

This was an action brought by a grower of Seree or Betel Leaf, against the Farmer of that article at Malacca, to recover damages for his refusal to take Seree grown by the plaintiff.

The plaintiff by his petition alleges himself to be a Seree planter within the Jurisdiction of the Court, but not within the Town of Malacca (at least this qualification may be collected from the petition) and that he did on the 17th day of June import into the Town of Malacca certain quantities of Seree, of the value, according to the Government rates of two or three cents per bundle, of 79 cents, and tendered the same to the defendant, as renter of the Seree farm, who refused to take them; and he claims damages for this refusal, which he alleges to be contrary to the provisions of the Regulation after mentioned.

The defendant by his plea does not deny any of the facts stated in the petition, but says 'that, before the tender of the plaintiff's Seree he was supplied for a day's consumption, and therefore rejected the plaintiff's Seree, as he was at liberty to do, and that the plaintiff was at liberty to sell the same at the place from whence he brought it, without let or hindrance from the defendant, or any person acting for him: and he further alleges that at the time of his bidding for the farm in question, and before the purchase, the vendors of the farm informed him that under the Regulation he was at liberty to reject Seree under such circumstances as those in the present case.

The plaintiff by his replication denies the matters alleged in the plea: but on the trial, the defendant substantiated them; and the case now stands for judgment on the whole record, the facts by the plea being treated as proved.

These facts however appear to me immaterial. It is not pretended by the plea that the plaintiff was present at the sale of the S eree farm, or in any way consented to be bound by the inter-

pretation then put upon the Regulations: his rights therefore must depend merely on the Regulations themselves, and not on any unauthorized explanation of them. With respect to his offering no hindrance to the plaintiff's retailing the Seree in question elsewhere, it is sufficient to say that no complaint is made on that ground: if that were the plaintiff's grievance, he ought so to have stated it, and not having done so, the only question is whether the defendant was not bound to take the Seree in question: if he was not, the Court is not asked to remedy any misconduct in the manner of the refusal, or arising after it. The only fact in the plea that could be of any importance is that of the defendant's having a sufficient supply before the plaintiff's Seree was offered. In my judgment this is also immaterial: the Regulation seems to me either to make it imperative on the farmer to take all Seree offered to him, or else to leave him without any obligation on the subject, at liberty to use merely his own discretion as to taking or refusing; and if so, the Court has nothing to do with the question of a reasonable refusal. But it is only oin this way that the facts mentioned in the plea could be of importance, for the particular limitation as to a day's consumption is clearly not authorized by the Regulation.

The Regulation, under which the question arises, is made for the purpose of conferring an exclusive privilege or monopoly. Its validity and force are not called in question, for each party claims under it: but it must be remembered, in examining it, that monopolies are contrary to the general spirit of British legislation, and that as such, the instruments establishing them require to be closely and strictly construed.

In the present case, however, there is little or no doubt about the abridgment of the original right of the subject: the monopoly is conferred by clear and distinct words within the limits defined by the Regulation; the question rather arises on the equivalent which the parties deprived of their common right are to receive, or rather it is whether they are to receive any: for I have already intimated, that I do not see any thing in the Regulation which compels the farmer to take the Seree brought to him at all, unless he is compelled to do so absolutely.

There are three classes of Seree growers whose interests are involved in the question before the Court, those who live within the limits of the monopoly, those who without those limits, but within the Company's territory, and those who have no connection with this place in particular, but import from a distance on speculation.

It might perhaps be desirable that there should be different

provisions with respect to these three classes, as the last class is entitled to the least consideration, and the first class is most affected by the monopoly. With respect however to the liability of the farmer, to take all Seree brought to him, the Regulation has not made any distinction between those classes; and as the same words are applied to all, it is impossible for the Court, in construing the same instrument, not to affix the same construction to them in every case.

The provision in question is the first clause of Section 7 of Regulation III A. D. 1830, and is expressed in the following terms: "For all Seree or Betel leaf produced or imported within the limits defined, the renter or licensed person, shall pay the proprietor at such rate per bundle, as the Governor in Council may determine at the time of granting the license for the year, public notice of such rates being given." The question arising on the provision is, whether it makes it compulsory on the renter to purchase all which is brought to him. It contains no terms imposing any condition as to sufficiency of supply, or any other reasonable cause of refusal: it either requires him absolutely to purchase, or leaves him at liberty absolutely to refuse.

The first observation which occurs is, that on the latter construction, the provision is merely and simply nugatory. It is true indeed that it professes to provide for the fixing a rate for all purchases by the renter: but if he has the power of merely refusing. be can by the exercise of that power make nearly any terms he pleases. It is indeed possible that he might in some extreme cases so clearly contravene the spirit of his engagement, as to subject him to some civil, or possibly penal liabilities; it is possible that the buying at all at an under price may be a case of this kind, but however this may be as a strict question of right, there is no doubt that the practical effect of the construction contended for, would be to leave almost absolute power in the hands of the ren-There would be generally great difficulty in the proof of any charge against him: and the power of exercising a degree of favouritism, and of giving an habitual preference to those growers who would to a certain extent compromise their right, would render it very impolitic for any one to insist fully upon his own.

These dangers indeed might be avoided by provisions requiring the renter to buy in all cases, unless where he had some reasonable excuse, pointed out and recognized by the Regulation.

For the purposes of the present case, it might be enough to say, that there are no such provisions in the existing Regulation, but it may perhaps be worth while for the purpose of meeting any argu-

ment that some such reasonable provisions might be inferred from the necessity of the case, to examine whether any one rule could be beneficially or fairly applied to all classes of producers. If there could, perhaps it might be implied, though the implication would be a remarkably violent one, but if there could not, as undoubtedly no varying rules are laid down, it would leave the whole question to be determined by the discretion or caprice of the Judge in each case, who would then have to say on each particular transaction, without any general rule to refer to, whether he thought the refusal reasonable: neither the grower nor the renter would have any known principle to act on, by which they could be secure as long as they adhered to it.

The first class, to be considered, are the growers of Seree within Before the Regulation, they had certain adthe Town of Malacca. vantages in their situation as being close to the best market-These they retain if the farmer is obliged to purchase from them. but if he is not, they are worse off than any other class. If they cannot sell in the Town, they are obliged to go to a distance to seek a worse market, and may perhaps be liable to penalties even for that; and they cannot even without risk consume Seree of their own growth, for the exception in Sect. 11 to the general imposition of penalties on all persons in possession of Seree not purchased from the renter, applies to persons importing Seree in prows, and to them only-Any construction, therefore, which allowed the renter to refuse their produce would be highly prejudicial to the growers within the Town, and at variance, I think, with every principle of justice towards them. This consideration cannot control the clear intention of the Regulation: but if the intention is doubtful it deserves attention.

The second class are the growers within the territory but without the Town of Malacca; a body of men like the first, entitled to the protection of the Government, and who ought not to be deprived of their original rights without some equivalent. The only equivalent they have is the certainty of their being able to dispose of their Seree at a fixed price: if they have not this, they are deprived of almost all chance of effecting a sale at all, for they are shut out of the principal market within their reach and confined to those purchasers scattered over the country, who have themselves the power of growing Seree for their own consumption. Nor would it be a slight inconvenience, even if their chance of selling rejected Seree beyond the Town was better then it seems, that they should be obliged either to forego the best market, or else to bring a cheap and perishable article from a considerable dis-

MALACCA 452

tance at the hazard of the complete loss of time and labour. This indeed is no more than all vendors of fruit, vegetables, &c., are every where liable to: but then they generally have the favourable as well as the unfavourable chances of the market. Here, they are nearly, if not altogether, excluded from the former.

If there were only these two classes, it might be thought the most reasonable construction of the Regulation is that the renter should be obliged to take their produce; but a different opinion might be entertained with respect to the third class, growers without the territory of the Company, who are not excluded from any but a very limited market, compared to the wide field to which they may have equally easy access, and entitled to no special consideration from the Government. It is, therefore, material to observe, that this class has been the subject of peculiar provisions in the Regulation, and to examine whether the provisions do not shew that it was intended that even they should be entitled to have their Seree purchased at the regulated price. By the 8th Section, all importers shall give notice to the farmer, who "shall within one hour after the receipt of such notice furnish a peon to superintend the landing of the same." There is no power expressed of refusing to allow it to be landed: only time is given to send an officer to prevent its being landed clandestinely.

It is not indeed, by Section 9 to be landed without a permit, but there is nothing to render the granting that permit discretionary in this case, any more than in others where it is not so; and if landed without such document it is seizable; not however on such seizure to be despatched without the limits of the town for the protection of the renter, but "to become the property of Government, to be disposed of in such manner as they may see fit." and similar provisions are made in Sections 10 and 11 with regard to other causes of forfeiture. The whole scheme therefore seems to treat all Seree imported as entitled to continue within the limits of the monopoly; and unquestionably if it is so, the rights of the importer can only be effectually secured, by treating the farmer as obliged to purchase. But if the importer has these rights, the grower within the British territory cannot have less.

I am not aware of any argument against the construction above put upon the Regulation, except a supposed hardship on the farmer. I do not mean on the present farmer in particular: if he has misunderstood the legal effect of the law under which he derives his privileges, he must, as in all such cases, take the consequences of his mistake; if he has been misled by any statement at the time of sale, he may perhaps be entitled or the Government in either

case might possibly be inclined to admit him to relief from his contract. But independently of the particular case, there may be a hardship generally in leaving the farmer obliged to take whatever quantity of a perishable article may be suddenly cast on his hands, at a fixed price. It would, however, be difficult to make an inconvenience of this kind, affecting an individual only, a reason for giving a construction to the Regulation injurious to large classes of men; and it would be particularly so, in a case where not only the party, who intends to purchase the exclusive right has his protection in his own hands by refusing to pay a price bevond which in his judgment will give him a profit, compensating him for all risks which he runs; but where the Government have also the power of securing him in a great degree, by fixing such rate of purchase, as will prevent it from being the interest of any one to injure him, by pouring in upon him a larger quantity of Seree, than is adequate to the reasonable consumption of the place. If there are to be monopolies at all, the most convenient course would seem to be, that the purchasing price should be fixed somewhat below the common market price, and that the seller, in compensation for thus having a less price than he might otherwise get. should have a certain sale secured to him; and this, if the prices are wisely adjusted, would be the effect of that construction of the Regulation, which I have put forward as the true one. Even on that construction, there may be inconveniences and difficulties, but these are only some of the consequences inseparable from a system of monopolies: on any other, it seems to me very difficult to avoid absolute injustice.

It is true, that the interpretation thus put on the Regulation in question may diminish the revenue, which has hitherto been obtained from the monopoly of Seree.

This, however, is a consideration which I do not think, the Court is at liberty to entertain either one way or the other. The Regulations are imposed by the Government with the fullest opportunity of considering their policy and effect; and the Government must be understood to have intended by them whatever is the true meaning of their provisions.

Whatever revenue, therefore, is likely to be realized upon the true and legal construction; I must consider to have been the amount which the Government thought it reasonable to derive from the particular article in question, not to be diminished to the prejudice of the public service, by any inclination towards the interests of the grower; nor to be increased by any forced interpreta-

tion to an exaction which the framers of the Regulation, on its most obvious construction, would have considered as over-taxation

These arguments however of justice and policy, though not immaterial in the discussion of a question of much public importance, are not those on which I rest the opinion which I think it my duty to express.—That opinion is founded on the words of the Regulation that the renter a shall buy all Seree, at a certain rate, which seems to me to leave no question as to his obligation to do so. He has refused to perform that obligation, and the judgment of the Court therefore must be for the plaintiff.

The Seree Tax was abolished many years ago. I insert this case, because Sir Malkin's judgments were considered the most scientific and logical. See judgments of Sir W. Norris and Sir B. Maxwell, p. 28,66 S. L.

July 29<sub>TH</sub>, 1834.

## BEFORE SIR BENJAMIN H. MALKIN, RECORDER Ab Dorahim v. Lieutenant Newbold.

An order to a person from his superior officer, to seize and detain any boats or vessels proceeding to places within certain prohibited limits for the purpose of observing a neutrality professed by the Government between two belligerent chiefs, will not authorize a seizure of a vessel and cargo returning from a place not within such prohibited limits, although she might have gone elsewhere and assisted either of such chiefs.

JUDGMENT. \*

This was an action to recover compensation for the seizure of a boat and certain articles mentioned in the petition; and the defence is in substance that they were seized by the defendant, a military officer in command at Qualla Lingy, because the Plaintiff had been engaged, or had incurred reasonable suspicion of being engaged in rendering assistance to one of the two belligerent parties, not subjects of the British Crown, in a manner which the defendant considered himself empowered and bound to prevent. And the sub-

<sup>\*</sup> A decision of an important nature was given lately at Malacca, by the Hon'ble the Recorder, in the case of Ab DORAHM versus Lieut, T. J. Newbold, of which mention was made in several of our papers some months back. The particulars are briefly these: The plaintiff Dorahim was owner and commander of a trading boat, and in November last, was returning therein to Malacca, from Sungye Raya, near Lingy, when the defendant, who was in temporary command of the Lingy station, seized, and detained the boat for four hours, taking from her, three guns, a blunderbuss, a musket, a quantity of gunpowder, and shot, with eight bags of rice, valued altogether at 222 Sp. Drs. The damages were laid at 500 Drs.

The defendant, in his plea, set forth that he was sent in September last to take command of the frontier post at the mouth of the Lingy River, by the Officer then commanding the Malacca field force, with instructions as contained in a letter annexed; (see No. 3.) that, consistently with those instructions the defendant considered himself justified in making the seizure, and in acting as he did. It was notorious at Lingy that the said beat as well as another belonging to a Chinese at Malacca, had been fitted out for the purpose of supporting the hostilities alluded to in the letter of Instructions, (No. 2.) by affording assistance to the vassal chief (alluded to therein) whose adherents were in great distress for provisions. How far this seizure was legal, the following judgment, passed in open Court at Malacca, on the 29th ult. by the Hon'ble the Recorder, will show.

stantial question is, whether he took a right view of his power and duties, or whether he has exceeded the bounds of the authority reposed in him.

The seizure took place under the following circumstances A native chief in the neighbourhood of the Malacca territory was engaged in hostilities with another, described in one of the documents produced, as his vassal. The relation between them is not material; the question in this case will not be whether their hostilities were to be called war or rebellion. The Malacca Government professed neutrality between the parties; and Mr. Newbold, the defendant, was sent to take charge of a post where the observance of this neutrality was thought particularly important. While he continued in charge of it, the plaintiff's boat cleared out from Malacca, with regular passes from the Authorities there, with a cargo consisting principally of Rice; delivered the greater part of it at a place beyond the limits of the British territory, and on her return was seized by the defendant for a real or supposed breach of neutrality in having supplied provisions to one of the belligerent parties, and probably with a view to prevent her again being engaged in a similar manner. If it were necessary to consider whether the boat had been actually so employed, the evidence would be very scanty; it seems to me however that the defendant hat at least very reasonable grounds for supposing it to have been so, and that the existence of these would justify his conduct, if the truth of the suspicion would do so. But it is my opinion that the seizure was not legal in either case.

It is not pretended to have been so on any general principles of English or international law. The right or duty to make it rests entirely on the orders received by the defendant; and the seizure cannot be supported unless he acted with those orders. and unless they were themselves, in all their stages, supported by competent authority. Now the defendant acted upon orders received from Brigadier Wilson, who issued them in pursuance of certain directions received from Mr. Garling, the Resident Councillor at Malacca. The seizure therefore is illegal, unless it were within the scope of Brigadier Wilson's orders, unless those orders were within the scope of Mr. Garling's instructions, and unless those instructions were within the limits of Garling's authority. A failure in any one of these ditions is fatal. It would be so in any case, as each step is professedly founded on the preceding one; but it is peculiarly so in this, as the whole interference is in abridgement of the general freedom of trade and action and cannot be justified (except per-haps where Military law has been declared by competent authority to be generally in force) by any thing short of the authority of Government, even if that would be sufficient.

Now it is quite clear, that nothing contained in either of the papers bearing the signature of Mr. Garling, authorizes the seiz. ure which has taken place. The first is merely a notification to the public that a blockade had been declared by a foreign power of certain places within the Lingy River, that passes would not be is ued for those places, and that confi-cation by the blockading power might follow any attempt to elude the blockade; a publication very expedient to be made for the benefit of the trading community of Malacca, but which in no way rendered it illegal for them to export to places within the blockaded limits (to which however the plaintiff's boat did not proceed) if they were inclined to run the risk and could obtain the necessary papers. The second, the letter addressed to Brigadier Wilson, refers to the former paper as containing every thing necessary with respect to what is there termed "probibited exportations," and carries the case therefore no farther except with respect to arms and ammunition landed at Lingy about which certain directions are given in the 8th paragraph. It contains indeed a suggestion that it would be expedient to compel boats to stop at Lingy, but it expressly declines to give any such order.

It is clear that these documents, however largely construed. cannot extend to authorize a seizure of a vessel and cargo, returning from a place not within the prohibited limits. It is not material to enquire whether the error arose from Brigadier Wilson's orders departing from the instructions which he had received, or from the defendant's exceeding those orders. It might perhaps be found that the error was divided; that the Brigadier had gone farther than he was directed in ordering the complete preservation of the neutrality of the British territory itself, and that the defendant had again exceeded his orders in attempting to enforce the neutralify of all persons proceeding from it. But whether the error rests with the one or the other, or is divided between them, if Mr. Newbold has exceeded the authority confided by the Government, he must be, at least civilly, responsible for the consequences of his actions. It is undoubtedly an embarrassing case for an officer, when his military and his civil duties are at variance; but it is only the inconvenience inseparable from every case of a double subordination.

The only other document to which it is necessary to refer is the letter from Brigade Major Wyllie, conveying the expressions of

Mr. Garling's and Col. Wilson's approbation of Mr. Newbold's conduct during his command at Qualla Lingy. I do not think any subsequent ratification could be properly treated as equivalent to an anterior command in such a case as the present; but however that may be, it is quite impossible in my judgment to treat this sort of general approbation as importing a recognition of the propriety of each particular transaction comprised in the service referred to. I am obliged in this case to come to the conclusion that the defendant, while acting in conformity with the general policy, has exceeded the particular orders of the Government; but I see nothing in his conduct which should in any way prevent him from receiving the highest testimony to the general activity and intelligence of his services in a difficult and responsible situation. But if not, his having received such testimony does not bear on the question.

Besides the principal evidence in the case, there was a good deal of testimony as to acts done by the plaintiff at a place called Pancallan Bala; and a sort of secondary defence that the seizure might be justifiable for the preservation of the neutrality of that place. It was not strictly within Mr. Newbold's command, but may probably be considered as a place referred to in Brigadier Wilson's orders; but certainly it is not in Mr. Garling's. The plea also and the whole of the evidence respecting the seizure itself treat it as made in consequence of what occurred at Sungye Raya and afterwards and not with reference to Pancallan Bala. Even therefore if the seizure might have been justified for the preservation of the neutrality of that place, that was not the ground of it; nor do I think that the evidence shews sufficient reason for expecting a future breach of neutrality there to justify a seizure on that ground; nor that such a seizure as that effected could have been warranted as a measure of prevention with respect to Pancallan Bala. And Mr. Newbold's authority was clearly limited to prevention: it did not extend to punishment. The evidence on this head therefore must be neglected; and the decision of the case will depend on the question already discussed, and must on the principles already stated, be in favour of the Plaintiff.

The only remaining question is to the amount of damages. The claims made for compensation for the loss of a beneficial contract and for the probable loss of a considerable debt seem to me quite unsupported by evidence. I can see no reason why the plaintiff should not have executed that contract, and no probability that that debt may not now, as well as ever, be enforced. The boat was almost immediately returned; the damages therefore will be

measured by the value of the other things taken; and as it was agreed on the trial that the plaintiff, if the judgment was in his favour, should receive back the things taken, according to the list produced by the defendant, with the exception of the Rice, the judgment of the Court will be for the damages laid in the petition, with costs; the damages to be reduced to thirty dollars on delivery of those articles.

## Documents Referred to:

Notice is hereby given to all whom it may concern that the Iyang di Pertuan Mooda of Rumbow declares that branch of the Lingy River which flows between Soongey Oojong and Sempang to be closed against the introduction of arms, ammunition and grain, during the continuance of the existing disturbance

No passes consequently will be granted for the exportation of the above

articles, to any place lying between Sempang and Soongey Oojong.

Any clandestine attempt on the Lingy River to evade the spirit of the restrictive declaration of the Iyang de Pertuan Mooda will subject the prohibited articles to confiscation at Sempang.

(Signed) S. GARLING.

Resident Councillor.

Malacca, 21st Sept. 1833.

No. 2.

Extract of a letter from the Howble S. Garling Esq., Resident Councillor, Malacca, to Brigadier F. W. Wilson C. B. Commanding the Troops; dated 25th Sept., 1833.

Adverting to what passed during the personal interview with which you recently favoured me, I have the honor to present you with a few suggestions which may in some degree guide you in the instructions which you may issue to the officer about to be deputed to take command at Lingy.

- 2. The Pangholoo at that station (Lingy) is named Inchi Bassier. From the distance of the port of Lingy, and the poverty of our establishment, we cannot enjoy that constant and practical control over Inchi Bassier which is indispensable for preserving in his mind a due sense of the subordinate character of his office. Having easy intercourse with the independent Chiefs on the Lingy border, he appears to have taken a very active and highly improper interest in the disputes between the Iyang de Pertuan Mooda and his vassal chief Inchi Kattas. It would consequently be highly expedient that the officer in command should maintain as far as compatible with his military duties, rigid surveillance over the movements of Inchi Bassier. He shall, if your reply place it within my power, be directed to consider himself immediately under the control of the officer in command and to receive his orders through him, as respects all matters connected with the political interests of Government in the Lingy quarter.
- 3. The enclosed copy of a notification issued on the 21st inst. will explain all that is necessary respecting prohibited exportations. It would tend to enforce these requisitions, were boats obliged to stop at the Lingy port and present their passes, I am however averse from insisting upon this, because I know not how the Authorities at Singapore and Penang may accord in my views and because the craft of the neighbouring independent native ports can-

not, under present circumstances be compelled to undergo this delay and inspection. Unless the orders were uniformly obligatory, embarrassment would spring out of its exertions.

4. The Guuboat Arrow commanded by Nacodah Daroo and now at Lingy, shall for the present, provided as above, be placed at the disposal of the officer

in command at that station.

- 5. An armed boat which shortly since was paid by Inchi Kattas to cut off communications between Sempang and the higher part of the Lingy stream was brought down to the Qualla. I am told that one man remains in charge of Inchi Bassier, and that Inchi Bassier has lodged in his house four of the brass pieces with which that boat was originally defended. Mr. Lewis was desired to direct that this boat should immediately quit our shores: I understand that it yet remains at Lingy. If my information be correct, the boat should be immediately sent away, it might be hauled up on shore, and taken under direct charge by the officer in command. The officer in charge shall endeavour to ascertain whether the brass pieces mentioned above, are with Inchi Bassier, and if they should be discovered, they should be demanded from him.
- 6. There was a small residence built for the occasional resort of Inchi Kattas. This was raised without previous communication with the local authority and being a measure altogether disapproved of, Mr. Lewis was desired to have it removed. The hut yet remains, if my information is correct. In this case, it should be immediately removed, giving the occupiers the option of doing this themselves.
- 7. It has been brought to my knowledge that Inchi Bassier has permitted individuals to bring over their families and after sheltering their families, themselves have gone up to Lingy. This must not be allowed. Inchi Bassier will be directed to bring to the notice of the officer commanding, whenever individual settlers or families, whether to settle or not, landed at Lingy. The discretion of the officer will be exercised in permitting any such practice as that noted above.
- 8. All arms and ammunition landed at Lingy should be lodged with the Guard and no export permitted without my express concurrence.

A true Extract.

(Signed) J. S. WYLLIE.

Major of Brigade.

No. 3.

Brigadier WILSON'S Instructions.

To Ensign NewBold,

Sir, 23rd Light Infantry.

I have the honor by order of the Commanding Officer to send you an extract of a letter received by him from the Resident Councillor at Malacca dated the 25th inst. also a notice to the Public by the same authority dated 21st inst. both of which are for your guidance and information in the exercise of the temporary command of Qualla Lingy, for which, from your general intelligence, as to the country and people of that quarter, you are especially selected.

The resistance of the vassal chief mentioned in that letter against his superior of Rumbow appears by public notoriety to be supported by arms and ammunition supplied by certain inhabitants of Malacca, who have taken a deep interest in the same, and it appears also that Qualla Lingy has been used

in several respects for the purposes of forwarding their views.

You are therefore requested not to allow Qualla Lingy or its vicinity, being British territory, to be made the means of supporting the above hostilities on either side, by permitting either men. arms, ammunition, or military stores. of any kind sent from Malacca by inhabitants of Malacca or its dependencies without competent authority, either to remain there or to proceed from it for that purpose.

If any such, brought there as above mentioned, are landed, you will be

pleased to detain them allowing the boats to depart.

Boats with the said warlike means found to have been sent to the Lingy River from Malacca by the aforesaid inhabitants, and which may have no regular pass from the proper Malacca authorities may be stopped and their arms and warlike stores be detained in like manner. But the general navigation of the river is not to be obstructed.

If any boats however employed for a similar purpose and sent up the river by persons not amenable to the Malacca authorities, they are to be warned off and not allowed to land in the British territory, not to be assisted by any persons belonging to it, but there is at present no authority for you to prevent such from proceeding up the river.

The Commanding Officer trusts to your management and address for carrying all this into effect, so as to avoid the necessity of resorting to actual violence and force, and an advantageous disposition and a strong display of your

means may be exerted to take away all thoughts of resistance.

You are requested to report to me for Col. Wilson's information, whatever extraordinary event may take place, as often as opportunities may occur, in the absence at present of any more regular means of communicating.

I have the honor to be, Sir,

Your &c.

Malacca, Sept. 1833.

(Signed) J. S. WYLLIE, Capt.

Major of Brigade.

# In re Chu Siang Long's Estate.

Adopted children of a Chinese entitled to joint administration of his Estate in preference to his nephew. (a)

Pinang Gazette, 20 Feb. 1858

Memo. by the Senior Sworn Clerk for the imformation of the Honorable the Recorder.

## Estate of Chu Siang Long, deceased.

Letters of Administration ad Colligendum having been granted to the Senior Sworn Clerk for the time being, the Resident Councillor is desirous of ascertaining to whom the assets realized, viz., Drs. 2441. 88 and balf, after liquidating all debts up to this date, should be paid; whether to the natural and adopted daughters of the deceased and to his adopted son jointly or to his lawful nephew, and whether the English or Chinese Law and Custom is to prevail

<sup>(</sup>a) This decision has been subsequently overruled, see Judgment in Reg. vs. Willans, ante page 79; same case in 3 Journ. Ind. Arch. page 41. S. L.

in this instance at Malacca. See Minute Book herewith sent Vol. 5th, Pages 316, 317, 319 and 320 together with the Papers filed in the above Estate. I am informed that the Parties interested will file a Petition on or before Tuesday next, touching the distribution of assets.

Court House, 29th April 1843.

#### SATURDAY.

I find, on reference to a note made by me on the 23rd August last, that I have already in effect decided this question, by giving it as my opinion that Chu Sing Kee and Chu Gan, the adopted son and daughter of deceased, who had applied jointly for Letters of Administration to the Estate, were entitled to administer in preference to the nephew Hee Toh Sing. For the same reason I think the assets should be divided between the son and daughters and that the nephew is not entitled to share with them. The ground of my decision is, that I take the same view of the Charter as Sir B. Malkin did with regard to the Law to be administered in these Settlements, under that instrument, and which cannot be better expressed than in his own words. In his able Judgment in the Goods of Abdullah in March 1835, Sir Bonjamin observes, "In the general expression the Charter seems to have intended to give a certain degree of protection and indulgence to the various nations resorting here, not very clearly defined, yet perhaps easily enough applied in particular cases, but not generally to sanction or recognize their law." And in his letter of the 17th July 1837 to Mr. Secretary Prinsep, he temarks as follows;, "But with respect to the Law whereby rights are constituted and estabished, I understand the Governor General to consider that it at present is, and ought in general for the present to continue, the Law of England; prodified indeed by considerations how far some of its particular provisions and enactments are suitable to the circumstances of the Colony, and administered in all cases with large and liberal regard to the manners, usages and religious of the different nations subject to its operation, but containing no provisions or principles which cannot be based upon that law, so modified and construed. It would seem very difficult, for instance, to refuse to treat a Hindoo son by adoption as a son and consequently as an heir in the absence of other sons; or to declare the eldest son of a Mohometan not to be the heir, because his father had two wives at once, and he was the son of second marriage."

In the 5th Paragraph of the Report made on the 8th February 1842, by the Law Commissioners on the Judicial Establishment of the Straits, they express their concurrence in Sir Malkin's view of

the spirit in which the law of England should be administered in these Settlements; and I have myself adhered in practice to the same principles, in quently directing the 2 or 3 widows of a Mahomedan Intestate to rank as one widow, and their several Children as one family, in the distribution of the Estate. \* In one of the Petitions in this case, that of Gan Nio, dated 25th August 1842, the case of Mootoo Vallee is cited to shew that a natural daughter has been considered as legitimate for the purpose of inheritance.

I am not aware of that case ( which I suppose however, is among the Malacca Records ), but repeat, for the reason above stated, that the adopted son and daughter are, in my opinion, alone entitled to the Assets.

WM. NORRIS.

#### MALACCA, 3RD MAY, 1843.

\* See Judgment in the goods of Lao Leong An, ante page 418, where this part of the judgment is upheld.

S. L.

Chulas and Kachee v. Kolson binte Seydoo Malim.

Plea of Coverture by a Mahomedan married woman is no answer to an action on her Bond.

Singapore Daily Times, 20th March, 1867.

JUDGMENT OF SIR P. B. MAXWELL, KNT., RECORDER.

In this case, which was tried before me lately at Malacca, the question arose whether to an action on a bond, a plea of coverture, by a Mahometan woman, was an answer to the action, and I took time to consider my decision.

The question how far the general rules of the law of England are applicable to races having religious and social institutions differing from our own, is of occasional recurrence in this Court, and it is seldom free from difficulty. It has been repeatedly laid down as the doctrine of our law that its rules are not applicable to such races, when intolerable injustice and oppression would be the consequence of their application. Thus, in the case of the Advocate General of Bengal v. Rance Surnomoye Dossee, 2 Moo. Ind. App. 22, it was held that the law which imposes the penalty of forfeiture of property for suicide, was inapplicable to Hindus. The absurd injustice of punishing a Mahometan for bigamy or polygamy is another and familiar instance of a portion of our law being inapplicable to a part of our population and therefore not applied to them. If the criminal law may be made to bend in this manner to the exigencies of natural justice, the civil law must be at least as flexible. and where our law is wholly unsuited to the condition of the alien races living under it, their own laws or usages must be applied to them on the same principles and with the same limitations, as foreign law is applied by our Courts to foreigners and foreign transactions. They must be regarded as persons having foreign domiciles, and governed for many purposes by this law, and as if they were residing among us temporarily.

Having this rule in view, I came to the conclusion, in a case of Hawah v. Dand, \* which came before me in Penang two years ago, that the rule of English law which vests in the husband various rights in the property of his wife were inapplicable to a Mahometan Marriage. Considering that by our law a husband is seised of his wife's freeholds during the marriage, or during his life, if a child is born alive, that he is not only entitled to enjoy but even to dispose of her chattels real. during the coverinre, and that he becomes absolute owner of all her personal property in possession, and of all "in action" which he reduces into posses ion during the marriage, being liable for her antenuptial debts and engagements only as long as the marriage lasts, it appeared to me impossible to hold that such a state of law could be applied to a marriage dissoluble at the will of the husband without intolerable injustice to the wife and to others. Our law. transmitted to us from early times and a rude state of society is, indeed, so little suitable to ourselves now that no woman with property can, without great folly leave it, on marrying, subject to that law; and settlements are necessarily made to protect her fortune from its operation. But if she is so improvident as to neglect this precaution, the contract of marriage is at least, indissoluble (or virtually so) and she acquires that right of being maintained by her husband during his and her joint lives. The Mahometan woman's contract is wholly different; it may be dissorted at any moment by her husband, and her right to maintenance goes with it. the other hand, her right of property and her powers of contract are unaffected by the marriage; under Mahometan law she remains in this respect like an English feme sole. We have never questioned the Mahometan husband's right to exercise that power of repudiation which is one of the incidents of the Mahometan marriage; why should we question any of the other incidents of that contract? why should the right of the hu-band be left unaffected by our law, but those of the wife be denied or ignored? It seems to me that it would be as illogical and unscientific, as it certainly would be oppressive and unjust to give to the husband all the rights both of a Mahometan and of a Christian and at the same

<sup>\*</sup> Vide ante page 253.

time to take from the wife her rights as a Mahometan and impose on her the torfeiture and incapacity which fall by our law on Christian women. If the Mahometan law were to prevail as regards the husband's right of repudiation, but the English law were to prevail in all that regards the property and status of the wife, it would follow that every Mahometan husband would have it in his power, not only to cast off under his own law, his wife whenever he pleased, but by force of the Christian law to send her into the world stripped of all her personal property and of her real property too, for the rest of his life, if she had the misfortune to bear him a child; absolving himself by the same act from the obligation of paying her antenuptual creditors with her money. Whether the mischievous consequences of thus attaching to one contract the incidents of another might not be adequately averted by the means by which many hardships of the common law have been at various times averted at home, viz:, by creating an implied trust or an implied contract, is a question which I have not omitted to consider; but it seems to me that to meet the evil in this way would be to deny that general rule which I mentioned at the beginning as a recognized part of our law which makes the common law so flexible and so adaptable to the various races subject to it : and the conclusion to which I have come is that at common law, and without any recourse to equity or to equitable doctrines, the rules which vest in the English husband various rights in his wife's property do not apply to a Mahometan marriage, but that her property continues vested in herself in the same way as if the Mahometan were the law of the land.

The question now before me is whether a Mahometan married woman is under any disability to bind herself by a bond. Here again, if the question were brought within the operation of the principles of Court of Equity, the woman would be liable as far as her separate property extended to the payment of this bond, and to the performance of her general engagements; Hulme vs. Tenant, 1 Bro. C. C. 16, Murray vs. Barlee, 3 M. and K. 223. But I see no necessity for resorting to equity. It seems to me that the question of her capacity or incapacity to contract must be determined, and for the same reasons, like that of her rights to property, by the law which governs her contract of marriage, viz : . the Mahometan law; and for these purposes the Mahometan subjects of the Queen here must be considered as governed by the law of their religion in the same manner as the rights and capacities of a foreign husband and wife are governed by the law of their Matrimonial domicile. A foreign woman could not set up. any more than an infant, her disability to contract unless the law of her own country incapacitated her from contracting, Male vs. Roberts, 3 Esp. 163; and if, as is the case, the Mahometan law does not impose on her that disability, her plea of coverture is no answer to the action.

Indeed, it is not necessary in support of this view to seek for analogies in cases to which foreign law is applied on principles of comity. We have at home exceptions recognized by the common law to the married woman's general incapacity to contract. Thus by custom, in the City of London, when she carries on a trade there on her own account, she is competent to bind herself by contracts in that trade; and if she is impleaded in the City, she pleads as a feme sole, and if condemned, is committed to prison till she makes satisfaction, and the husband and his goods are not chargeable; Lavie and another vs. Jane Cox, 3 Burr, 1776. The wife of an alieu enemy or of a transported convict is equally competent. I see therefore, no anomaly in holding that a Mahometan married woman is left unaffected by English law as to her capacity to contract as well as in respect of her rights of property, and that she is. like the London married woman subject to her own custom or law. and liable to be sued on her contracts. The incapacity to contract which affects a married woman at common law is founded on the fiction that she and her husband are one person; but I think that fiction may well be confined to that kind of marriage for which it was intended, the Christian and indissoluble marriage. To extend it to the Mahometan marriage would be to apply it to something different, and to establish but a weak foundation for a law absurdly unjust and intolerably oppressive. I am therefore of opinion that this plea is no answer to the action.

This decision is not inconsistent with holding, as I have held, that for the purpose of conveyance of land, the deed of a Mahometan, as well as of a Christian woman, is not operative unless acknowledged as required by the Indian Act of 1855, corresponding to the fines and recoveries abelition Act; for it is a fundamental principle of the common law that for all that relates to the forms and solemnities of conveyances, and even of executory contracts relating to land, the lex loci regit actum; Story Conf. L. ss. 363, 435. \* Nor, for similar reasons, is it inconsistent with the decision by which it was established that the English Statute of Distributions applies to all persons of whatever religion or race. Nor does it seem inconsistent with the application of our own rules

<sup>\*</sup> See Cader Meydin v. Shatomah, page 260; also see to cases noted at the end of case on p. 383.

in questions of guardianship. But even if it were otherwise, it must be borne in mind that in applying foreign law to particular cases, Courts must be governed more by considerations of public policy and convenience than of strict logical consistency, and it is not therefore necessary to pursue this part of the subject further. For the reasons stated, I am of opinion, that the plea of coverture in this action is no answer to it, and that there must be judgment for the plaintiff.



## SUPREME COURT.

#### March 17th, 1870.

## BEFORE SIR P. BENSON MAXWELL, C. J.

Sahrip v. Mitchell and another.

The word "prescription" in the 12th Section of Act XVI of 1839, means local custom, usage or law.

SEMBLE.—The prescription or custom therein mentioned is not only reasonable, but very well suited to any country like this where the population is thin and the uncleared land is superabundant and of no value.

SEMBLE.—The introduction of English law into the Settlement by the Charter no more supersedes such custom, than it supersedes custom in England.

QUERY.—Is the Lieut. Governor a "Collector" within the meaning of the Act? QUERY.—Is it necessary for a notice under the 3rd Section, to state that unless the persons in occupation of the land "engage for, or remove from" it, within a month from the date of such notice, they will be ejected?

THE CHIEF JUSTICE.—This is an action of trespass. The petition contains two counts, one for expelling the plaintiff from his land and preventing him from reaping the growing crop: the second, for breaking and entering into his dwelling house and expelling him from it, whereby he was prevented from carrying on his business, and was compelled to procure another dwelling. The first three pleas deny the trespass and the possession. The fourth alleges that the plaintiff, not being a cultivator or resident tenant holding by prescription, was by a duly served notice informed that the land in question had been assessed by Government from the first of January 1870, at 97 cents per annum, and was therein also called upon by the Collector to take out a proper title for the land, within a month from the date of the service of the notice, and that in default he would be ejected: The plea than avers that the plaintiff would neither comply with the terms of the notice nor remove from the land within a month; and that the defendants by the order of the Collector, and in the exercise of the powers given to him by Act XVI of 1839, assisted him in ejecting the plaintiff, which are the trespasses, &c.

The Act referred to authorizes the Collector, by Section 3, to eject persons in occupation of land otherwise than under a grant or title from Covernment, if they refuse to "engage for or to remove from" it within a month from the date on which they are called upon by him to enter into such engagement or to remove. But the last Section of the Act excepts from its provisions "such cultivators and resident tenants of Malacca as hold their lands by prescription, subject only to a payment of one-tenth part of the produce thereof, whether such payment be made in kind" or in money.

The trespusa was clearly proved; indeed, it was in substance admitted. It was proved or admitted that a notice in the terms stated in the fourth plea, signed by the Lieut, Governor, had been served on the petitioner a month before, and that by that officer's orders the defendant Mitchell, a clerk of the Land Office, accompanied by another clerk of the same Office, went in company with the other defendant, India, who is a police duffadar, three other policemen, and an European Inspector, to the house of the plaintiff at about 11 a. m. on the 24th December. The policemen were armed with swords, and one of the Europeans with a double barrelled gun. The plaintiff was absent; but they turned his wife and family out of the house, and the furniture was removed from it by their orders. The garden and paddy land were also taken possession of; they were afterwards sold by Mitchell; and the plaintiff was kept out of possession down to the present time. The plaintiff's wife made some imputations, in the course of her evidence, on the conduct of defendants and their comrades, in aggravation of the trespass, to the effect that her box had been broken open and some money taken from it, and that some of her furniture had been broken; and she also spoke of a threat to burn down the house if she did not leave it; but, as I stated yesterday at the close of the case, I did not think the imputations sufficiently borne out to be entitled to credit. They were denied by Mitchell; they were not corroborated, as they might have been, if true, by other testimony; and I had no evidence that any complaint had been made at the time, of the loss or destruction of the money or goods. A question arose in the course of the case, whether the Lient, Governor was a "Collector" within the meaning of the Act XVI of 1839, and another, whother the notice was in accordance with the 3rd Section, as it did not require the plaintiff "to engage for or remove from " the land; but in the view which I take of the main question in the case, viz., whether the plaintiff is one of those "cultivators or tenants holding by prescription,"

MALACCA 468

who are excepted from the provisions of the Act by the 12th Section, it is unnecessary that I should express any opinion on them.

The term "prescription" does not apply in English law, as Mr Drvidson justly observed, to land, but only to incorporeal here-ditaments, such as rights of way, common or light; and if the term were construed in its strictly technical sense, it would find no application to cultivators of land. We had no Statute of Limitations in this country, relating to land, until 1859, and if "prescription" were to be understood as referring to a title to land acquired by long occupation, the Section in question would find little or no application here, because the title acquired by the cultivators and tenants in Malacea does not depend on any statute or law of limitations. But there is another sense in which the term may have been used, viz., in the sense of "custom," and in this sense it would make the Section so widely and justly applicable to the circumstances of this Sectlement that it appears to me beyond doubt that it is in this sense that the Legistature used it.

"Prescription," properly so called, is personal; it is the title acquired by long usage by a particular person and his ancestors, or the preceding owners of the estates in respect of which of the right is so acquired. A "custom" is al o established by long usage, but unlike prescription, it is "local" not personal; when once established, it becomes the law of the place when it prevails, to the exclusion of the ordinary law; and those who have a right under it, have it, not because they and their ancestors or predecessors, have long enjoyed it, as in the case of prescription, but simply because the custom or local law gives it to them, without any reference to the length of their enjoyment. In the case of prescription, long usage gives title to an individual; in the case of custom, long usage establishes the custom, and it is the custom, becomes law, which gives title to a class of persons in a locality, and gives it to them at The two things are essentially different, but there is a sufficient similarity or analogy between them, -usage being an element common to both,-to account for their being occasionally confounded; and I think it plain, from the history of the land tenure of Malacca that it was in the sense of "custom" that the term "prescription' was used in the Act of 1839.

It is well known that by the old Malay law or custom of Malacca, while the Sovereign was the owner of the soil, every man had nevertheless the right to clear and occupy all forest and waste land, subject to the payment, to the Sovereign, of one-tenth of the produce of the land so taken. The trees which he planted, the houses which he built, and the remaining nine-tenths of the pro-

duce, were his property, which he could sell, or mortgage, or hand down to his children. If he abandoned the paddy land or fruit trees for three years, or his gambier or pepper plantations for a year, his rights ceased, and all reverted to the Sovereign. If, without deserting the land, he left it uncultivated longer than was usual or necessary, he was liable to ejectment. See Mr. Newbold's Work on the Straits of Malacca vol. 1. p. 160. It is clear that rights thus acquired are not prescriptive, in the technical sense of the term, but customary. They are acquired as soon as the land is occupied and reclaimed, and the title requires no lapse of time to perfect it.

It was contended by the Solicitor-General that such a custom was unreasonable and therefore invalid; but if such an objection could now be raised after its long recognition, as I shall presently show, I should not he sitate to hold that the custom was not only reasonable, but very well suited to any country like this, where the population is thin and the uncleared land is superabundant and of no value. It must be for the advantage of the State to attract settlers to lands which are worthless as forest and swamp, and thus to increase at once the population and wealth of the country. A similar custom or law prevails in Sumatra, Marsden's Sumatra, 224; in Java, every Javanese has the right to occupy uncleared land, paying for it by giving the State his personal labour on road-making or similar public work, one day in five, or now, under the Dutch, one day in seven; and though it might, seem unreasonable in England that one person should acquire an indefeasible title to occupy the land of another by felling his forest and ploughing the land, I think that in the circumstances of these countries, it is neither unreasonable nor impolitic for the Sovereign power to offer such terms to persons willing to reclaim and cultivate its waste lands. But it is too late to question its reasonableness, after a long and continuous recognition amounting virtually to an offer of forest land to all who chose to clear it, on the terms of the custom.

The Pertuguese, while they held Malacca, and, after them, the Dutch, left the Malay custom or lex non scripta in force. That it was in force when this Settlement was ceded to the Crown appears to be beyond dispute, and that the cession left the law unaltered is equally plain on general principles, Campbell v. Hall, Cowp 204,209. It was held in this Court, by Sir John Claridge, in 1829, to be then in full force; and although it was decided by Sir B. Malkin in 1834, in conformity with what had been held in India, that the law of England had been introduced into the Settlement

by the Charter, which created the Supreme Court, it seems to me clear that the law so introduced would no more supersede the custom in question, than it supersedes local customs in England. Further, the custom has always been recognised by the Government; down to the present time, tenths are collected, both in kind and in money, from the holders of land acquired under the custom. and from 1838 to 1853 commutations of tenths into money payments were frequently made by deeds between the East India Company and the tenants, in which it was recited that the Company "possessed the right of taking for the use of the Government one-tenth of the produce of all lands in the Settlement of Malacca." The Malacca Land Act of 1861 plainly refers to and recognizes the same customary tenure, when it "declares" that "all cultivators and resident tenants of lands," (the sovereign or quasi manorial rights of which had been granted away by the Dutch Government.) "who hold their title by priscription, are, and shall be subject to the payment of one-tenth of the produce thereof to the Government," either in kind or in money fixed in commutation.

That the 12th Section of the Act of 1839 would be justly applicable to these customary tenants can admit of little doubt, when it is considered that that Act made all persons, in general terms, holding lands in these Settlements otherwise than under Government Grants, liable to assessment "in such manner, at such rate, and under such conditions' as the Collector, under instructions from Government, chose to impose; and authorized the Collector to eject all those who declined to "engage for" (that is, I suppose, to accept the terms of the Government,) "or remove from the land" in their occupation. These provisions, suitable enough to a new Settlement like Singapore, where neither custom nor even prescription had had time to spring up, could not, without manifest injustice, have been applied to persons in Malacca who had already a good title to their land by the law or custom of the place: it was to be expected that provision should be made for excepting such a numerous and important class of persons from their operation, and it seems to me that provision was made for that purpose by the 12th Section, the Legislature using the word "prescription," not in its technical meaning in which it would be insensible having regard to the circumstances of the Settlement, but in the sense of local custom, usage or law, with which it is readily confounded.

If this be so, it is plain that the plaintiff was not liable to ejectment by the Collector for declining "to take out a proper title" for the land in his occupation, under the Act of 1839. It was forest

and uncultivated land when he cleared it in 1829, and he paid tenths to the Government from that time until 1853, when he was appointed Punguluh. This appointment he held until 1868, and during his tenure of it he was, as is usual, exempted from payment. He was deprived of the apointment in 1868, and he paid tenths again in 1869. He is therefore plainly one of the customary tenants protected by the 12th Sect. of the Act of 1839.

The only remaining question, then, is as to the damages. The plaintiff claims three hundred Dollars. It seems to me that a serious wrong was done him and that he sustained serious injury when he was expelled from his home and from his land. lived there for forty years, and I shall not conceal that I have some sympathy for the feelings of the Malay peasant, driven from his cottage, from the orchard which he planted and the field which he reclaimed;—from his home, in a word and from the fruits of his labour, - because he would not give up his good title for one which he was not bound to accept, and nobody had a right to impose on him. But further, the injury was done by or under the orders of an officer, or officers, invested with certain powers, and under the colour of those powers; and I think that when public officers set about exercising powers which necessarily inflict suffering or injury, or interfere with the rights or liberties of any person, they ought to be extremely cautious in what they do, or make their agents or subordinates do. Here the defendants, acting on their own or their Superior's view of the law, (it matters not which, as regards the plaintiff,) committed a breach of the law, and a breach which might have resulted in a breach of the peace; for among the seven men engaged in the trespass several were armed, and if the plaintiff had happened to be present, they might have encountered resistance; blood might have been shed, and the officers of the law would have had to answer for all the consequences of having been trespassers and wrong-doers. On the other hand, most of our native peasants, in the plaintiff's place, whether they resisted or vielded. at the time, to the display of force in the name of the law, would not have ventured, as the plaintiff has, to question its legality in the Court of Justice, and they would thus be permanently dispossessed, contrary to law. For these reasons, I think it my duty to do what in me lies to discourage such proceedings; and therefore, having regard to all the circumstances of the case, I shall give the plaintiff the amount of the damages which he has claimed.

Judgment for the plaintiff for 300 Dollars.

Weekly Reporter vol 2, Criminal Rulings, Page 51.

APPELLATE JURISDICTION.

#### HIGH COURT OF CALCUTTA.

The 22nd March 1865.

Present.

The Honble E. Jackson and F. A. Glover, Judges. NEGLIGENCE WITH RESPECT TO ANIMINAL—EVIDENCE.

Queen versus Brojonarain Pubraj.

Tried by the Officiating Magistrate of Balasore, on a charge under Section 289 of the Penal Code.

A Conviction under Section 289 of the Penal Code quashed, in-as-much as evidence did not allude to the negligence of which the accused has been found guilty, and because the evidence was not taken in the presence of the accused.

Mr. Justice Glover.—The records of this case were sent for on the petition of Brojonarain, in order that the Court might satisfy itself as to the legality of the Magistrate's proceedings, and of the order of the Sessions Judge on revision, under Section 434 of the Code of Criminal Procedure, upholding them.

The petitioner was convicted under Section 289 of the Penal Code, and fined 5 Rupees.

It appears from the record that a stallion belonging to him broke loose from his syce, whilst proceeding through the Balasore bazar, and did some damage to the ponies of a Police Inspector and Constable.

I do not see how Section 289 can be applied to this case. The horse was being led by a syce (and as there is not the slightest attempt at proving that the animal was a vicious or unruly one, it was immaterial whether that syce was a man accustomed to the horse or not) and broke away from him frightened, as the petitioner alleges (and the allegation is not denied) by a passing buggy. It appears to me to have been a clear case of accident, and that no negligence can be attributed to the owner in consequence.

The remedy for those whose ponies had been injured by the loose

horse, lay in the Civil Court.

I think, therefore, that the conviction under Section 289 was not warranted; but were the facts otherwise sufficient, the Magistrate's order would still have been illegal under Section 194 of the Code of Criminal Procedure, in-as-much as the evidence of the prosecution witnesses was not taken in the presence of the accused, who had consequently no opportunity of cross-examining them.

Mr. Justice E. Jackson.—I agree with Mr Justice Glover that this conviction cannot stand. The evidence does not in any way allude to the negligence of which the Magistrate has found the accused guilty; and that evidence appears to have been taken behind the accused's back. The fine, if realized, must be returned to

the accused.

## 2 W. R., Cr. R, p. 57.

The 1st April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, Judges.
Commitment (Annulment of)—Compromise.

Queen versus Salin Sheik.

Referred under Section 335 ActXXV of 1861.

A Commitment once made by a Magistrate to the Sessions cannot be annulled by his allowing the prosecutor to file a compromise.

Mr. Justice Jackson.—The Cantonment Magistrate seems to have considered it necessary to draw out a charge against the prisoners before he examined, and he does not deem to have been aware when he took their answers on the charge that he was thereby committing them to the Sessions. However this may be, the Cantonment Magistrate, after he had committed the prisoner for trial under Section 226 of the Procedure Code, had no authority to quash the commitment. His order accepting a razeenamah, and safeenamah is without jurisdiction, and consequently void. The Sessions Judge should fix a day for the trial of the prisoners before him, and direct the Magistrate to have all the parties in attendance on the date fixed by him. As regards the persons against whom the Sessions Judge thinks proceedings ought to be taken, he can apply the provisions of Section 435 of the Procedure Code.

Mr. Justice Glover.—There can be no doubt that a commitment once made by a Magistrate to the Sessions cannot be annulled by the former allowing the prosecutor to file a compromise. Such case moreover must go to trial when once committed, however incomplete the original investigation may have been.

But, if this investigation be found to be incomplete, the Sessions Judge has the remedy in his own hands, and can summon, and examine any witnesses he thinks proper under Section 367 of the Criminal Procedure Code.

There appears to be, therefore, no necessity for quashing the Joint Magi-trate's commitment, as his investigation, though it may have been unsatisfactory, has certainly not been illegal.

The reason given by the Joint Magistrate for accepting the razeenamah is untenable. Basiruddeen having once on oath charged the accused parties with a crime cognizable by the Court of Sessions must be bound over to prosecute. He cannot now withdraw his charge except at the expense of his recognizances. For the rest, I concur with Mr. Justice Jackson.

## 2 W. R., Cr. R., p. 57.

THE 3RD APRIL, 1857.

Present.

The Hon'ble E. Jackson and F. A. Glover, Judges.

AMENDS-THEFT.

Queen versus Gogun Sein and others.

Reference under Section 434 Act XXV of 1861.

Amends cannot be awarded for a false charge of theft.

It has been frequently ruled by this Court that "amends" can only be awarded in respect of cases coming under Chapter XV of the Code of Criminal Procedure and as the case referred by the Magistrate was one of theft under Section 379 of the Indian Penal Code, the order of the Deputy Magistrate was illegal, and should be quashed.

#### 2 W. R., Cr. R., p. 60.

THE 13TH APRIL 1865.

Present.

The Hon'ble C. B. Trevor and G. Loch, Judges.

STATE OFFENCES—JURISDICTION—TRIAL OF BRITISH SUBJECT FOR ACTS DONE WITHIN OR WITHOUT BRITISH TERRITORY.

Queen vs. Moulvie Ahmudoollah.

Mr. H. A. Eglinton and Baboos Kishen Kishore Ghose and Juggadanund Mookerjee for the Prosecution.

Mr. W. L. Mackensie for the Defence.

A person who is admittedly a subject of the British Government is liable to be tried by the Courts of this Country for acts done by him whether wholly within or wholly without, or partly within and partly without, the British Territories in India, provided they amount together to an offence under the Penal Code.

The prisoner is charged on the following counts:-

Ist.—That he attempted to wage war against the Queen, and thereby committed an offence punishable under Section 121 of the Indian Penal Code.

2nd.—That he abetted the waging of war against the Queen, and has thereby committed an offence punishable under Section 121 of the Indian Penal Code.

3rd.—That he has abetted the attempt to wage war against the Queen, and has thereby committed an offence punishable under Section 121 of the Indian Penal Code.

4th.—That he abetted the collection of men with the intention of waging war against the Queen, and has thereby committed an offence punishable under Sections 109 and 122 of the Indian Penal Code.

5th.—That he, by illegal omission, concealed the existence of a design to wage war against the Queen, intending by such concealment to facilitate the waging of such war, and has thereby committed an offence punishable under Section 123 of the Indian Penal Code.

The Judge has found the prisoner guilty on the 2nd, 4th and 5th counts. He acquits him of the first count, and considers the 3rd merged in the 2nd; the Judge has passed a sentence of death and forfeiture of property on the prisoner which sentence is submitted for the confirmation of this Court under Section 380 of the Code of Criminal Procedure, and the prisoner filed an appeal against the finding and conviction under Section 408 of the same Code

The Counsel for the prisoner raised a legal objection that the prisoner had not committed an offence punishable by the Penal Code, that on reference to the remarks made by Morgan and Macpherson in their edition of the Penal Code, and to the illustrations appended to Section 121 of that Code, it was clear that the words "waging war" meant an insurrection or rebellion within the British Territories, and had no reference to a war waged by foreign enemies, or by parties owing allegiance to the Queen, if such war were waged outside of the British Territories. The prisoner had been acquitted on the first count; and the Counsel contended that, if the view of the law which he took were correct, the prisoner could not be convicted of abetment under the 2nd, or on any other count of the charge as the war had not been waged within the British Territories.

And that even, if assistance had been rendered (an allegation by no means satisfactorily proved against the prisoner), it had been given to parties not within the territory, and it was therefore immaterial whether such parties were foreign enemies, or persons owing allegiance to the Queen.

The contention of the learned Counsel for the prisoner cannot, we think, be sustained. The prisoner is admittedly a subject of the British Government. By Section 2 of Act I of 1849, which is still in force, he is amenable to the law for all offences committed by him within the territory of any Foreign Prince or State; and by Section 3 of the Penal Code, he is to be dealt with according to the provisions of the Code for any act committed beyond the territories vested in Her Majesty by the Statues 21 and 22 Vic. ch. 106, in the same manner, as if such act had been committed within the said territories. Whether, therefore, the acts which the prisoner did, were wholly

within or wholly without, or party within and partly without the territory of Her Majesty, if they together amount to an offence under the Penal Code; he is liable to be tried for them by the Courts of this country.

We think that the evidence before us is sufficient to support the conviction of the prisoner under Section 121 of the Penal Code, upon the 2nd count of the charge; but as we do not find from that evidence that the prisoner took a more active part in this conspiracy than others who have been convicted and sentenced, we decline to confirm the sentence of death passed by the Sessions Judge, but direct that the prisoner Ahmudoollah be transported for life, and do forfeit all his property to Government.

## 3 W. R., Cr. R., p. 38. The 4th July 1865.

Present.

The Honorable C. Steer, Judge.

Destruction of a valuable security—Tearing a pottah.

Queen versus Nittar Mundle.

Committed by the Joint Magistrate and tried by the Sessions Judge of Midanpore on a charge of Defacing Document purporting to be a valuable security, under Section 477 of the Indian Penal Code.

The tearing up of a pottah is the destruction of a valuable security within the meaning of Section 477 of the Penal Code.

The evidence establishes that the prisoner took and tore up a pottah, and that is a document which is a valuable security. The conviction and sentence under Section 477 is legal, and there is no ground for the appeal.

## 4 W. R., Cr. R., p. 3.

The 7th September 1865.

Present.

The Hon'ble C. Steer, F. B. Kemp, and W. S. Seton-Karr, Judges.

Wrongful confinement of a woman.

Queen versus Amer Daraz and Roresh.

Queen versus Amer Daraz and Roresh.

Committed by the Assistant Magistrate of Madareepore, and tried by the Officiating Sessions Judge of Dacca, on a charge of Wrongful Confinement of an abducted woman.

Held by the majority of the Court (Kemp, J. dissenting) that the prisoners were rightly convicted of wrongful confinement of a woman, the facts of the case showing that she never went willingly to the house of the prisoners, and was not a willing inmate while she was there.

Kemp, J.—These prisoners have been convicted, Ameer Daraz of an offence under Section 368 of the Indian Peual Code, sentence two years' rigorous imprisonment, and the prisoner Roresh of an

offence under Section 346, sentence one year's rigorous imprisonment.

The prisoners are father and son; six other prisoners were committed with these two prisoners on a charge framed under Section 366. They have been acquitted, the Sessions Judge being of opinion that there was not sufficient legal evidence to warrant a conviction.

The factum of the abduction of the woman is, therefore, not established.

The woman was found by the Police in the house of Ameer Daraz, and it is said that the son Roresh held a cloth over the woman's mouth to prevent her crying out.

The prisoners, who have been acquitted, are related to the woman, and the story of the prisoner Ameer Daraz is that he paid money to the relations of the woman, and obtained her in "nikhah."

This statement is borne out by the evidence for the defence is by no means an improbable statement.

I utterly discredit that the prisoners wrongfully confined and concealed the woman, knowing that she had been abducted, (see Section 368 Indian Penal Code).

It may be that the woman was not consulted in the matter, and that she did not approve of the connection.

I would acquit the prisoners. The papers must be laid before my colleague Mr. Justice Seton-Karr.

Seton-Karr, J.—I regret that I am unable to concur with my colleague. The Judge's reasons for acquitting six of the prisoners are very illogical; for the first says that the charge against them is well founded, and then that there is not sufficient legal evidence for conviction, which is not the case, for the evidence was ample, if the Judge believed it. However we have nothing to do with their case now.

But what is there to invalidate the clear evidence of the complainant herself and of the Police Constables, to the place where she was confined, and to the efforts made by Roresh to stifle her voice. I cannot see that there is anything. Two of the witnesses of Ameer Daraz only heard of the alleged nikhah, and the third witness is not at all clear, by his own account, in his recollections of the asserted nikhah.

I consider that the evidence of the complainant and that of the Police, and the entire absence of any motive on the woman's part for making a false charge, to be good grounds for a conviction of an offence very common in the Eastern districts, and I would not interfere.

The case must go to a third Judge.

Steer, J.—The charge of abduction broke down, and the prisoners who were indicted on that charge were acquitted.

In regard to the charge of confining the woman Khotija, which has been preferred against the appellants, the evidence of the woman herself to that effect, and the evidence of the Police who found her in confinement are, I think, quite sufficient to sustain the conviction. I cannot doubt the truth of the woman that she was not a willing resident in the house of the prisoners; and, that being the case, the prisoners had no right to detain her, and are guilty of wrongfully confining her. That she went to the house of the prisoners willingly is, I think, very improbable. That there was no abduction of the woman Khotija, does not seem to have been found by the Judge. There was no evidence to convict the parties who were charged with that offence, and they were necessarily acquitted; but the Judge did not doubt that the woman had been abducted.

The prisoners, whose case is now before the Court are charged with wrongfully confining Khotija.

The evidence leaves no doubt on my mind that she was in confinement when she was released by the Police. Was that wrongful confinement? If it was against her will that she was taken to the house of the prisoners, and if it was against her will that she was detained there, the case amounts to a wrongful confinement, and I agree with Mr. Justice Seton-Karr that they were rightly convicted the facts of the case shewing satisfactorily that she never went willingly to the house of the prisoners, and was not a willing inmate while she was there.

# 4. W. R., Cr. R., p. 5.

Тне 9тн Ѕертемвек, 1865.

The Hon'ble F. B. Kemp and W. S. Seton-Karr, Judges. Extortion—Abetment of Extortion—Cheating.

Queen vesus Meajan and Obhoy Churn Doss.

Committed by the Deputy Magistrate of Maldah, and tried by the Sessions Judge of Dinagepore, on charges of extortion and abetment of extortion respectively.

To amount to the offence of extortion, property must be obtained by intentionally putting a person in fear of injury to that person and thereby dishonestly inducing him to part with his property.

The mere issue of a Hookumnamah (to collect statistical information) by a Police Officer, is no legal ground for a conviction of abetment of cheating or of extortion.

Kemp, J — These prisoners are—the first a Head Constable, and second, a Deputy Inspector of Police, both in Zillalla Maldah.

The Constable has been convicted of extortion, the Deputy Inspector of abetting that offence; sentence, each three years' rigorous imprisonment, and to pay a fine of 200 Rupees.

It appears from the evidence, that the Deputy Inspector, Obhoy Churn Doss, issued a Hookumnamah which was intrusted to the prisoner Meajan. The object of this Hookumnamah was to collect certain statistical information as to rates, &c. Many traders and shopkeepers paid small sums to the Constable, which he levied from them without authority, under cover of the said Hookumnamah; these sums were appropriated by the Head Constable.

I am of opinion that the prisoner Meajan cannot be convicted of the offence of extortion. To amount to the offence of extortion, properly must be obtained by intentionally putting a person in fear of injury to that person, and thereby dishonestly inducing him to part with his property. In this case the Constable told the shopkeepers and traders that an order had gone forth that they were to be taxed in small sums of 4 amas and 8 amas per head. They fell into the trap and paid. It is more in consequence of their credulity than in consequence of any personal fear that they parted with their pice. The prisoner Meajan has been guilty of the offence of cheating. He deceived the traders and shopkeepers, and dishonestly induced them to part with their property. I would convict him of that offence, and would sentence him to one year's rigorous imprisonment. Section 417 Indian Penal Code.

I am of opinion that the prisoner Obhoy Churn Doss is not guilty of the offence of abetment of cheating. Beyond is uing a Hookumnamah (to collect statistical information) which it appears is part of a Police Officer's customary duty in the District of Maldah, he took no part whatever in the after-transactions, nor did he, as far as I can ascertain from the evidence, in any way countenance and abet the acts of the prisoner Meajan, or participate in the money levied by him. I would acquit him. The papers must be laid before my learned colleague Mr. Justice Seton-Karr.

Seton-Karr, J.—I quite concur. The mere issue of a Hookumnamah, however inexpedient and not unlikely to lead to extertion is no legal ground for such a conviction and other evidence to abetment there is none. The fine must be refunded also.

The prisoner Obhoy Churn Doss is released, and the sentence of Meajan reduced as proposed.

#### 4 W. R., Cr. R., p. 6.

The 12th September 1865.

Present.

The Hon'ble F. B. Kemp and F. A. Glover, Judges. Kidnapping from lawful guardianship.

Queen versus Gunder Sigh.

Committed by the Officiating Magistrate of Monghyr, and tried by the Sessions Judge of of Bangulpore, on a charge of Kidnapping a minor female.

To bring a case under Section 361 of the Penal Code, there must be a taking or enticing of a

child out of the keeping of the lawful guardian without his consent.

Glover, J.—I doubt whether the prisoner can be punished under Section 361.

The girl, Itwarea, according to her own statement, had run away from her father's house in consequence of ill-treatment on the part of her mother, and, meeting the prisoner on the road, had agreed to take service as a coolie. The place where the prisoner lived, and to which the girl was taken, was a populous suburb, where there were many houses, and where she could easily have called for and obtained assistance, had she been unwilling to remain. This, however, does not affect the prisoner's case, and I only mention the circumstance as the Sessions Judge has laid some stress upon it.

Was the girl then under her father's guardianship, when she fell in with the prisoner? I think not; she had voluntarily abandoned her house, and was running away. She was 14 years old, and not, therefore, of such tender age as to lead to the supposition that she had strayed from home, and was to all appearance a free agent.

She, when taken before the Magistrate, asserted that her parents were dead, and that she was going with her mother-in-law to Sylhet and Cachar; she now states that the prisoner made "eyes" at her and frightened her into saying what she did; but this is an unsupported statement, and the girl's manner before the Magistrate must, as that official observes, have been satisfactory, or he would not have signed her registry ticket.

To bring the prisoner under Section 361 there must be a taking of the child out of the possession of the parent, and such a taking is not, in my judgment, disclosed by the evidence in this case.

I would release the prisoner. The papers must go before another Judge.

Kemp, J.—I concur; there was no taking or enticing the girl out of the keeping of her lawful guardian against his consent. The prisoner must be released.

#### **4** W. R., Cr. R., p. 7. The 11th September 1865.

Present.

The Hon'ble F. B. Kemp and W. S. Seton-Karr, Judges. Kidnapping from lawful guardianship.

Queen versus Gooroodoss Rajbunsee.

Committed by the Officiating Joint Magistrate and tried by the Sessions Judge of Dinagepore, on a charge of Kidnapping.

A person in carrying off, without the consent of her lawful guardian, a girl to whom he was betrothed by his father, who; after permitting her to reside occasionally in his house, suddenly changed his mind and broke off the marriage, is guilty of kidnapping from lawful guardianship, punishable under Section 363 of the Penal Code.

Seton-Karr, J.—I have been over the evidence very carefully, in order to see if there was any reason to place full confidence in the defence of the prisoner that the girl Dinno Monee had been betrothed to him, and had previously resided in his house on several occasions.

I believe that the Sessions Judge suggests the true explanation of the very different versions for the prosecution and the defence, and that there had been some previous talk of a marriage, whereupon the prisoner, when the narriage was broken off, without consulting the father of the girl, carried her off, to his own house from the company of the two women, witnesses Nos. 3 and 4, and would not give her up until the Police was sent for.

Looking at that case in this light, I think that there are grounds for even a lighter sentence than that passed by the Sessions Judge, and I would reduce the 1 year's rigorous imprisonment to 4 months.

Though no harm was done to the girl, the prisoner acted illegally in carrying her off as he did; and, on this ground, I think the conviction can be sustained under Section 363.

The papers must go to Mr. Justice Kemp.

Kemp, J.—I am of opinion that there is evidence to prove that the girl was betrothed to the prisoner by her father. For some reason which does not appear in the record, the father, after permitting his daughter to reside occasionally in the prisoner's house, changed his mind and broke off the marriage.

The prisoner, meeting the girl in company with two females, carried her off to his house. He did not use any force, and he did not attempt to conceal her; when the Police came he delivered her up to them. He was wrong in carrying off the girl without the consent of her lawful guardian; and he has, therefore, committed the offence of kidnapping from lawful guardianship, an offence punishable under Section 363 of the Indian Penal Code.

I concur with my learned colleague in the mitigated sentence passed by him.

### 4. W. R., Cr. R., p. 9. The 12th September 1865.

#### Present.

The Hon'ble F. B. Kemp, G. Campbell, and F. A. Glover, Judges Previous Convictions—Construction of Section 75, Penal Code Queen versus Hurpaul, Appellant.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of Theft.

Held by the majority of the Court (Campbell, J., dissenting) that Section 75 of the Penal Code only applies to convictions of offences committed after the Code came into operation.

Campbell, J.-I see no grounds whatever for this appeal, which I dismiss.

But, as a Court of Revision. I think it necessary to take notice of an important point of law in the judgment of the Sessions Judge. The case was one of a petty theft, but the Deputy Magistrate committed it to the Sessions, on the ground that the prisoner, having been previously convicted and sentenced to three years for theft, was liable to a more severe punishment under Section 75 of the Penal Code. The Sessions Judge's construction of the law is that, to make the prisoner liable under Section 75 of the Penal Code, the former as well as the present offence must have been committed at a time when the Penal Code was in force, and that, as the former case occurred in 1860, the prisoner is not so liable. I am inclined to think that the Deputy Magistrate was right. It is difficult to suppose that it was the intention of the Legislature, as it were, to condone all past offences, and that the most habitual thief on a fresh conviction can only be punished as for a single simple theft.

I rather think that Section 75 applies when the prisoner has been previously convicted of any one of those offences which are now punishable under Chapters XII and XVII of the Penal Code, and that, when the offence is of that nature that there can be no doubt of the identity of the offence under the old law, and under the new law (which is the case as regards theft), the rule of Section 75 may be applied without scruple. In this case, the theft having occurred in a dwelling house, the Sessions Judge has given the prisoner seven years, on the ground which may meet the justice of the case, but as the point of law is important, I refer it to another judge.

Kemp, J,—I cannot concur with my learned colleague. The prisoner may have been guilty of the offence of theft in 1860; but clearly that offence was committed before the Indian Penal Code came into operation. Section 75 does not, therefore, apply, and, in

my opinion, the interpretation of the law by the Sessions Judge is correct.

Section 75 of the Code enacts.—"Whoever having been convicted of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards shall be guilty of any offence punishable under either of those Chapters with imprisonment of either desceiption for a term of three years or upwards shall be subject for every such subsequent offence to transportation for life or to double the amount of punishment which he would, otherwise, have been liable for the same, provided that he shall not in case be liable to imprisonment for a term exceeding ten years."

Chapter XVII refers amongst others to the offence of theft, of which offence the prisoner has been found guilty; but the former offence was committed in 1860, and was not an offence committed subsequent to the Penal Code came into operation. The offence committed in 1860 is not punishable under the Code, supposing the prisoner evaded justice. The procedure on his trial after apprehension for an offence committed in 1860, would be according to the Code of Criminal Procedure, but the punishment would be under the law in force before the Penal Code came into operation.

Both convictions, the former and the present, must be for offences punishable unber the Code, and therefore committed after it came into operation: Vide Morgan and Macpberson's Commentary, page 53, Section 75 does not apply. The case must go before a third Judge.

Glover, J.—I concur with Mr. Justice Kemp in thinking that both convictions referred to in Section 75 must be of offences punishable under this Code, and committed after it comes in force.

The words used in the Section are "whoever having heen convicted of an offence," and "an offence" is by Section 40 declared to be "a thing made punishable by the Penal Code." The words denote only those acts which the Code punishes.

As, therefore, the previous conviction of theft took place before the Penal Code came into operation, Section 75 cannot apply.

4 W. R., Cr. R., p. 13.

Тне 18тн Ѕертемвек, 1865.

Present.

The Hon'ble G. Loch, F. B. Kemp', and W. S. Seton-Karr, Judges.

Cheating—Breach of Contract. Sadoo Churn Pal, Petitioner.

Case in which the majority of the Court held that it was one of Breach of Contract, while Seton-Karr, J., was of opinion that the prisoner was rightly convicted of cheating under Sections 415 and 417 of the Penal Code.

Kemp, J.—The petitioner has been sentenced to six months' imprisonment and a fine of 300 Rupees, 200 of which to be paid to the prosecutor as compensation for the offence of cheating. The Sessions Judge of Dacca on appeal confirmed the sentence.

On petition to this Court, I directed the Sessions Judge to submit the record of the case in order that I might satisfy myself of the legality of the conviction (Section 404 Code of Criminal Procedure.) In the meantime I directed the prisoner to be admitted to bail.

The pleader for the petitioner contends .-

1st.—That the circumstances as detailed in the evidence, do not disclose a Criminal offence.

2ndly -That there is no evidence of dishonest intention.

I find on reading the evidence that the petitioner and others held a joint-decree against the prosecutor for Rupees 194-10. Execution was sued out, the property of the prosecutor attached, and its sale was imminent, when prosecutor is said to have entered into an amicable arrangement with the petitioner, agreeing to pay 154 Rupees, provided a petition was filed in Court, and the sale was staved. The petitioner did not fulfil his promise. The sale took place, and a portion of the property was purchased by the petitioner's vakeel. I hold that this is a simple breach of contract for which the prosecutor, if so advised, has his Civil remedy in a suit for damages. The prosecutor may have been led to expect that the petitioner would take measures to withdraw the execution process, and to stay the sale; but there is no evidence whatever that, at the time the petitioner agreed to settle matters for Rupees 154, it was then his intention not to do what he led the prosecutor to expect that he would do. The main element which constitutes the offence of cheating, is, therefore, wanting, viz., there was no intention then present to deceive and thereby to induce the prosecutor to make conditional arrangements for an amicable adjustment of the decree. I would quash the conviction of the prisoner, and direct the release of the prisoner.

The papers must be submitted to my colleague Mr. Justice Seton-Karr.

I also observe that the award of compensation to the prosecutor was illegal, the offence not coming under Chapter XV of the Code of Procedure.

Seton-Karr, J.—This case can only be looked at by us under Section 404 of the Criminal Procedure Code. I hold, and have always held, that we cannot go into or criticise the evidence, and that any such attempt on our part would be highly prejudicial to

the interests of justice. The case is one in which the decision of a Magistrate has already been confirmed, in regular appeal, by a Sessions Judge. All we can do is to consider if there has been error in a point of Law.

I am well aware that the distinction between Criminal and Civil liability is occasionally somewhat narrow, and that it is very necessary to take care that the Lower Courts do not confound different transactions, or make individuals liable to conviction and punishment, who ought properly to be only liable for a suit for breach of contract.

But in the present case I hold that there was quite sufficient, on the evidence, to justify the Court in drawing the inferences of cheating, which they did draw, and in convicting the appellant under Section 417 of the Penal Code. The decisions, especially that of the Deputy Magietrate, are very clear and elaborate, and they show clearly that the appellant did receive the sum of 154 Rupees, which he has stoutly denied ever having received; and that he did at length write a letter to his pleader. which also he, on trial, has denied ever having written. It is also clear that the property of the complainant was sold, and that he got nothing as an equivalent for the sum of 154 Rupees which he had paid over to the appellant. Besides, this distinction between the Criminal and the Civil Law was never pleaded in either of the Lower Courts, in which the appellant simply denied the receipt of any money from the complainant.

From these circumstances, i. e., proof of payment, and the defendant's resolute denial of any such payment, and from the other facts, I think the Courts were quite at liberty to draw the conclusion that "the defendant at the time of receiving the money had never any intention of stopping the sale of the land." The Courts, in consequence, rightly convicted the appellant of cheating under Sections 415 and 417.

The defendant, to my thinking, did, "by deceiving, fraudulently and dishonestly induce the complainant" to deliver to him property, (i. e., 154 Rupees) which he would not otherwise have delivered. The Illustrations appended to the Section quoted (415) appear to me to fit this case very well.

Seeing, then, no illegality in the conclusions drawn from the evidence, I would allow the conviction to stand. The case must go to a third Judge.

Loch, J.—I agree with Mr. Justice Kemp in thinking that this is a case of breach of contract and not of cheating, and that the prisoner Sodoo Churn should be released. On the 23rd Magh 1271, he agreed to compromise a debt, under a decree in the name

of his two brothers, with the complainant in this case, promising not to sell the debtor's property on payment of 154 Rupecs. money was paid, but the property was advertised for sale on 25th idem, and the sale took place. From a petition presented by the complainant to the Civil Court on 14th March following, he stated that, in order to raise money to pay the debt, he had sold this property to a third party: that, on 25th Magh, he got a letter from Sadoo Churn to his vakeel, informing him of the compromise. but the vakeel, considering this to be a fraud of the debtor, allowed the sale to go on; that he went again to Sadoo Churn, who admitted having received the money in payment of his debt; but he was withheld by the representations of the auction-purchaser from presenting a petition setting forth the fact. In his deposition before the Deputy Magistrate the complainant stated that he did not give Sadoo Churn's letter to the vakeel till the 26th. Magh, though he knew the property was advertised for sale on an earlier date; and on his applying to the vakeel, the auction-purchaser, Juggobundo, told him to take 100 Rupees, and be satisfied.

From what has been stated above, taken from the complainant's own allegation, it does not appear to me that Sadoo Churn, in his dealings with the complainant, had any intention to cheat him. He never denied the payment. He gave the complainant means to stop the sale of the property, which, however, if complainant's story be true, the vakeel, for reasons best known to himself refused to act upon, he being, as is alleged, one of the auction-purchasers, Sadoo Churn might have gone farther, and stopped the sale by going to Court, and informing the officer conducting the sale that he had received the money, or he might, subsequent to the sale, have cleared himself from blame by joining the complainant in a petition to the Court; but his failure to do so does not prove him guilty of cheating. I, therefore, concur with Mr. Justice Kemp in passing sentence of acquittal.

4 W. R., Cr. R, p. 20.

THE 28TH OCTOBER, 1865.

Present.

The Hon'ble F. A. Glover, Judge.

Whipping (in addition to imprisonment.)

Queen versus Amarut Sheikh.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of Theft, &c.

In order to legalize whipping in addition to imprisonment in the case of a second conviction, the offence must be the same in both cases.

No point of law is taken in this appeal, nor any objection preferred to the summing up of the Judge. The appeal is, therefore, inadmissible.

I remark, however, with reference to the punishment of stripes awarded under Act VI of 1864, in addition to the three and half years' imprisonment, that, in order to legalize the whipping, the offence must have been the same in both cases. The Judge was, therefore, wrong in awarding stripes under the first head of the charge, in-as-much as that conviction was for theft in a building, whereas the former conviction was for dishonestly retaining stolen property knowing it to be stolen; the Jury should-have been told that, if they found the prisoner guilty of theft, they should have brought in a final verdict of not guilty on the second count, knowingly having in possession the stolen property being under the circumstances of this case part and parcel of the original offence of theft.

As, however, the prisoner has been convicted on the second count, the punishment of stripes, which is in that case for a second conviction of the same offence, may stand.

#### 4. W. R., Cr. R, p. 25.

THE 20TH NOVEMBER 1865.

Present.

The Hon'ble G. Loch, F. B. Kemp and F. A. Glover, Judges.

Bigamy. .

Queen versus Enai Beebee.

Committed by the Deputy Magistrate and tried by the Sessions

Judge of Sylhet, on a charge of Bigamy.

HELD by the majority of the Court that a woman, who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise, and contracts a second marriage within sixteen months after cohabitation with her first husband, without disclosing the fact of the former marriage to her second husband, is liable to enhanced punishment under Section 495 of the Penal Code.

Glover, J.—This case was sent for by the Court under the provisions of Section 405 of the Code of Criminal Procedure.

The facts are undisputed, and the prisoner was rightly convicted under Section 494 of the Penal Code.

But, taking into consideration the circumstances of the case, and the long absences of the husband, the last one extending to sixteen months, I think that the sentence inflicted by the Sessions Judge might, with propriety, be reduced, and that simple imprisonment for six months will amply meet the requirements of justice.

The case must go before another Judge.

Loch, J.-I do not see any sufficient ground for the reduction

of the sentence in this case. The prisoner, if the evidence of her husband is to be believed, and I see no ground for questioning it, contracted a second marriage within sixteen months of her husband's last visit to her. He was employed in one of the tea gardens at Cachar, and used to be absent for long periods. If the prisoner's statement, that her uncle came and told her that her husband was dead, were true, his friends would have known something about it. She herself, living, as was probable, in her husband's house, would be the first to communicate the intelligence to her husband's mother who was living with her, and there would have been the usual lamentations for the death of their relative. There is no evidence to prove any part of her story, and further she appears never to have disclosed these circumstances to the person with whom she contracted the second marriage, so that she is liable under Section 495 to enhanced punishment. This must go to a third Judge.

Kemp, J.— I concur with Mr Justice Loch. The prior marriage is admitted; the prisoner did not use such reasonable means as were within her power to inform herself of the fact of her first husband's alleged demise; she contracted a second marriage within sixteen months after collabitation with her first husband, on the averment that she was told by her uncle that her first husband was dead.

Without attempting to inform herself of this fact, and, be it observed, her first husband's relations admittedly resided within easy distance from her place of residence, she contracts a second marriage, concealing all these facts from her second husband.

To such a woman I am not inclined to show any mercy.

# 23rd November, 1869. CALCUTTA LAW REPORTS.

Appellate Jurisdiction—Criminal, vol 4. p. 7.

Before Mr. Justice Loch and Mr. Justice Glover.

The Queen v. Khadim Sheikh (Appellant.)

Act 45 of 1860, ss. 107, 202, and 382—Abetment—Omission to inform Police when an offence had been committed.

An omission to give information that a crime has been committed does not under Section 107 of the Penal Code, amount to abetment, unless such omission involves a breach of a legal obligation.

A private individual is not bound by any law to give information of any offence which he has seen committed.

Glover, J.—The prisoner in this case has been convicted of abetment of an offence under Section 382 of the Penal Code, that

is of theft after preparation made for causing death. The abetment held to be proved, was the prisoner's omission to give information of the offence—information which the Jury were told he was legally bound to have given.

We think that the Jury were misdirected in this point, and that the conviction is therefore bad. The prisoner was arraigned on several charges, on all of which, except the one of abelient, he was acquitted, and the only evidence of the abetment was the man's confession to the Magistrate, in which he stated that he saw two persons whom he named hold the boy Umes under water and drown him.

This admission might under certain circumstances have made the accused guilty of abetting a murder, but there is nothing in the law which makes it criminal in a person in the prisoner's position to omit to give information that a theft with violence has been committed; a mere omission to give information can only amount to abetment under Section 107 of the Penal Code, when the person who neglects to give the information is one bound by law to give it. For instance, a Policeman or a Chowkidar would come under this Section, if they saw an offence committed and gave no information, so would a Zemindar in certain particular cases, but a private individual is only morally bound, and if he omits to do what he ought to do, he may suffer in conscience or character, but the law will not touch him.

The prisoner in this case was not one of those persons whom the law compels to give information, and we think therefore that the Jury were wrongly directed to find him guilty of abetment by illegal omission on the strength of the confession made by him to the Magistrate.

As he has been acquitted by the Jury on all the other counts of the indictment, we think that he must be immediately discharged.

Loch, J.—In this case the Sessions Judge, looking at a note appended to Explanation 2, of Section 107, in Morgan's Edition of the Penal Code, held that the prisoner was guilty of abetment as he had failed to give information of the theft which he had seen committed, and he charged the Jury to find a verdict of guilty if they believed the prisoner's statements. The Jury did accordingly find the prisoner guilty of abetment on the 4th head of the charge; but after the verdict was given, the Sessions Judge considered this part of his direction to the Jury to be incorrect, as the concealment, being subsequent to the commission of the offence, could not be regarded as an abetment of the offence. But, considering

that the prisoner had committed an offence punishable under Section 202 of the Indian Penal Code, he sentenced him to six months' imprisonment. It appears to me that the prisoner has been prejudiced by what was a misdirection on the part of the Judge to the Jury. He stated the law to the Jury; and on his statement they found the prisoner guilty of abetment. He subsequently found his statement of the law to be incorrect, and the prisoner has been sentenced to punishment for an offence with which he was not charged. A further question arises, whether the prisoner is liable to punishment under the provisions of Section 202 of the Penal Code. Was the prisoner legally bound to give information of the theft which he had seen committed, attended as it was by circumstances of violence such as brought the offence within the provisions of Section 382? Is a private individual bound by any law to give information of a robbery or other offence which he has by accident seen committed? If not, then the prisoner has committed no offence. I think he must be released.

#### 5 W. R., Cr. R., p. 19.

THE 26TH JANUARY, 1866.

#### Present.

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, Judges.

Conviction and sentence on several charges—Rioting—
Hurt—Grievous Hurt.

Queen versus Azgur and others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of Riot being armed mith deadly weapons, &c.

Conviction and sentence both for rioting and for grievous hurt upheld, the punishment being on the whole not more severe than might properly have been awarded if the conviction had been for grievous hurt only.

A person convicted of rioting should not be convicted of hurt or grievous hurt caused to himself.

In this case fifteen prisoners have been found guilty: 1st, of rioting being armed with deadly weapons; 2nd, of causing grievous hurt by means of an instrument for stabbing or cutting; and 3rd, of causing hurt by the like means. On the conviction for rioting, they have been sentenced to three years' rigorous impri-

sonment each; on the conviction for grievious hurt, two, namely Azgur and Roshundee, have been sentenced to an additional term of two years' rigorous imprisonment, while all the others have been sentenced to one additional year. No punishment is awarded on the conviction for causing hurt, the punishments given under the other heads being deemed sufficient.

There is no question as to the propriety of the finding of fact as to the riot and as to one of the prisoners, Fakeer Mahomed, having been hurt "grievously," and as to another prisoner, Ahmed Ally, having been hurt in the riot.

The prisoners appeal, all of them, on the general ground that, as they were all convicted of the riot, they ought not also to have been found guilty on the other counts. But we think there is nothing legally wrong in the convictions, as the rioting did not necessarily lead to grievous hurt, and as the causing of grievous hurt was in respect of one person, while the causing of hurt was in respect of another. Moreover, the sentences are not in the whole heavier than might properly have been inflicted, had they been found guilty of causing grievous hurt alone.

Fakeer Mahomed and Ahmed Ally, the two prisoners who were hurt, have, however, a very substantial ground of objection to the convictions and sentences as to them. They have, no doubt, been rightly found guilty on the first count, for rioting. But, as Fakeer Mahomed is himself the person to whom the grievous hurt with which the prisoners were charged was caused, it seems somewhat absurd, and it is wholly inconsistent with justice, that he should be found guilty of the offence of causing that grievous hurt. His conviction and sentence under the second count of the charge (viz., for causing grievous hurt, &c.,) are quashed and set aside. In like manner as Ahmed Ally is himself the person to whom the hurt which is the subject of the third count was caused, it is absurd to find him guilty of the causing of it. He is not sentenced under that count, but it is impossible for us to say how far his conviction under it may have influenced the Judge in his fixing the sentence under the second count; and, as he is sentenced to a long period of imprisonment for the offence of rioting, we think that the sentence passed on him in the second count (for causing grievous hurt) should also be set aside.

As regards the other prisoners who have appealed, the appeal is dismissed.



### 5. W. R., Cr., R., p. 18.

THE 25TH JANUARY, 1866.

Present.

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and L. S. Jackson, Judges.

Evidence—Accomplice. Queen versus Dwarka.

Committed by the Officiating Magistrate of Moonghyr, and tried by the Sessions Judge of Bhaugulpore, on a charge of Abetment of Murder, &c.

The testimony of an accomplice is not alone sufficient for a conviction. The corroboration must be on matters directly connecting the prisoner with the offence of which he is accused; and the evidence of two or more accomplices requires confirmation equally with the testimony of one.

Having considered this case together, we find that the Sessions Judge has convicted the prisoner. appellant, upon the evidence of two accomplices, which evidence, as to the appellant's participation in the crime, is not in any way corroborated.

We think that the rule by which our Courts of Criminal Jurisdiction must be guided, is that the testimoup of an accomplice is not alone sufficient for a conviction, that the corroboration must be on matters directly connecting the prisoner with the offence of which he is accused; and that the evidence of two or more accomplices requires confirmation equally with the testimony of one.

We observe that in this case, if the evidence of the accomplicawitnesses be true the prisoner has taken part in a deliberate and atrocious murder for the meanest motives, and, if he be guilty, it would be against the interests of justice that he should escape.

It appears to us that, if the accomplices have told the truth, a little inquiry ought to lead to the obtaining of evidence by which their testimony might be confirmed.

We direct, therefore, under Section 422 of the Code of Criminal Procedure, that the Court of Sessions shall make enquiry whether the prisoner is known to have associated with the accomplices, or with the man Gurbhoo who has been hanged for this crime, or whether he is known to have frequently absented himself from his house about the time of the commission of this crime without legitimate cause, whether he was seen at the place where the deceased men were poisoned or where the poison was bought about the time of the transaction: and that the Court shall receive such evidence as may be offered on the part of the presecution upon these or other points bearing upon the guilt of the prisoner.

After recording such evidence with all the precaution which the

peculiar circumstances of the case will suggest to the Judge, and allowing the prisoner to allege any thing, or bring any counter-evidence which he may have to offer, the Judge will return the proceedings to this Court for final orders.

#### 8. W. R., Cr. R., p. 32.

THE 6TH JUNE 1867.

Present.

The Hon'ble Sir Barnes Peacock, Kt., Chief Justice, and the Hon'ble C. P. Hobhouse, Judge.

Jurisdiction—High Court (as a Gourt of Record)—Contempt of Court—Presents to officers of Court by successful suitors.

In re Abdool and Mahtab, Chupprassees of the High Court.

The High Court, as a Court of Record, has the power of summarily punish-

ing for contempt.

Any officer of the High Court who asks or accepts a present from any person in whose favour judgment is pronounced by the Court, is guilty of a gross breach of duty and a contempt of Court.

So also any person who offers or gives such present is guilty of a con-

tempt of Court.

The Chief Justice, in addressing the prisoners, said :-

It has been brought to my notice that you Abdool and Mahtab, being officers of this Court and chupprassees assigned to attend upon Mr. Justice Hobhouse, have applied for and received presents from suitors or mooktears of suitors in consequence of judgments having been given in their favour by the Court in which Mr. Justice Hobhouse was one of the Judges.

The Chief Justice then asked the prisoners separately whether they had anything to say why they should not be punished for so doing.

The prisoners separately answered in the negative, and left the case in the hands of the Court.

The Chief Justice, addressing the prisoners, said:—Your conduct in this case having been brought to my notice by Mr. Justice Hobbouse, I requested Mr. Field the Officiating Registrar of the High Court, to make an affidavit of what took place before him. He says that on the 2nd day of July 1867, he was directed by the Hon'ble Mr. Hobbouse to take down the statements of you, Abdool and Mahtab; that he did accordingly take down your statements; and that the written statements annexed to his affidavit contained a true account of the statements which you made.

You, Abdool, stated that you and Mahtab were disputing; that you were in the habit of asking money from suitors who win their cases; that they (the suitors) do not give you anything unless you

ask; that you got in all 8 annas or a rupee; that in some months you got nothing; that you got a couple of annas from each person; that the chupprassees all did the same; that the jemadar sometimes gets bukshish as well as others; that Mahtab got his fair share; that they (meaning the suitors) never gave you anything until they were happy at having won their cases; and that you did not ask beforehand, for you knew you would not get it.

You, Mahtab, stated that you were fighting with Abdool; that you had been at feud with him for a long time; that you told the Hon'ble Mr. Hobhouse that Abdool took all the bukshish and would not give you your share; that you got two or four pice from the Mooktears of the suitors who win their cases to buy sweetments; that you got this douceur after the cases are disposed of: that you change week about, two men staying in the house and two men remaining in Court; that Abdool gets nothing at the house; that it is at the Court only that you get it; that you do ask for it; that they (the suitors) would never think of giving anything unless you asked for it; that there was a dispute about 8 or 10 days ago at the lodging; that you are now at Court and Abdool at the house; that he and you are occasionally both on duty at cutcherry (that is, at this Court); that you are newly appointed and he an old hand; that you have been 8 months emploved: that you never took anything yourself, but that the jemadar and Abdool have occasionally given you a few pice as your share; and that only 8 or 10 annas altogether are made during the month.

There can be no doubt from these statements that both of you have applied to suitors of this Court who have been successful in the cases which have been decided by a Court of which Mr. Justice Hobbouse is one of the Judges, for bukshish or presents in consequence of those decisions. You are both officers in the pay of Government, and both public officers on the establishment of this Court; and although, according to the duty which has been assigned to you, you are to attend on Mr. Justice Hobbouse, you are not the less public officers of this Court and public servants within the meaning of the Penal Code. Although, therefore, you were the officers attending upon Mr. Justice Hobbouse, and the presents which you received had relation to judgments passed by a Court in which he was one of the Judges, your offence is not an offence against that Judge individually, but an offence against the High Court.

If I thought it necessary, I should commit you for trial for an offence punishable under Section 165 of the Penal Code; and if

you should be convicted of an offence under that Section, you would be liable to imprisonment for a term which might extend to two years with or without fine. But as this is the first time since the High Court was established that an offence of this nature has been brought home to an officer of this Court, I shall not resort to such an extreme proceeding.

The offence of which you have been guilty is, beyond all doubt, a contempt of the High Court for which the Court has power to punish you without sending you for trial to the ordinary Courts of Criminal Judicature. This Court, by the express terms of the Letters Patent, is a Court of Record; and there can be no doubt that every Court of Record has the power of summarily punishing for contempt.

Among the instances given by Blackstone in the 4th Vol. of his Commentaries, page 284, are those committed by the officers of the Court for abusing the process of law, or deceiving the parties by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty; "for," he adds, "the malpractice of the "officers reflects dishonor on their employers, and if frequent or "unpunished, creates among the people a disgust against the "Courts themselves."

I wish to state publicly, and to have it distinctly understood, that any officer of this Court, who asks for, or accepts, a present from any person in whose favour a judgment is pronounced by this Court, is guilty of a gross breach of duty, and a contempt of this Court. It matters not whether the sum received is large or small; whether it is for services performed or to be performed, or wholly irrespective of any services rendered by the officer. It matters not whether the present is given in consequence of a judgment pronounced by the Judge upon whom it is the peculiar duty of the officer to attend, or to which such Judge was a party, or in consequence of a judgment pronounced by any other of the Judges of the Court. It matters not whether it is before judgment or after judgment. The mere fact of asking for, or receiving, under any circumstances whatever, any present, reward, or gratuity, in consequence of any judgment or proceeding of any kind in this Court or in any way connected therewith, is punishable as a contempt of this Court.

The offence is not confined to those who ask or receive; but it extends equally to those who offer or give. A fruitless request is as great an offence as an actual acceptance, and an offer which is refused is punishable in the same manner as if the present or reward were accepted.

In Martin's case, in which a person wrote a letter to the Lord Chancellor stating that he had been threatened with a bill in Chancery and enclosing a Note for £ 20, of which he begged the Chancellor's acceptance, the offender was punished for a contempt of Court.

To offer money to an officer of the Court, though, perhaps, not so grave an offence as that of offering it to a Judge, is beyond all doubt a serious contempt of the Court to which that officer is attached.

A suitor who seeks for justice is not, as soon as he succeeds, to be harassed and annoyed by these requests for presents on the part of the officers of the Court. I am determined, as far as lies in my power, to put an end to all practices of this kind in this Court, either on the part of the officers, or of the parties or their mooktears. Every suitor, therefore, may be certain that any charge made upon him for presents to any officer of this Court is wholly unwarranted, and that the party making the charge is liable to severe punishment at the hands of the Court.

As this is the first case in which any officer has been brought before the Court for punishment, I think a very lenient sentence will suffice. I by no means wish it to be understood that the Court will consider such a punishment adequate if, on any future occasion, an officer or other person be brought before the Court for an offence of a similar nature.

You are liable to fine or imprisonment or to both. We have considered anxiously what punishment should be awarded. You are poor men, and I do not wish to deprive you or your families of any part of your wages, and therefore I shall not punish you by fine or add fine to imprisonment.

You, Abdool, have been employed as a public officer for a much longer time than Mahtab. I therefore order that you be imprisoned in simple imprisonment in the Presidency Jail of Calcutta for the term of 14 days inclusive of this day.

You, Mahtab, having, as I understand, been employed as an officer of this Court for a period of 8 months only, I order that you be imprisoned in simple imprisonment in the same Jail for a period of 10 days inclusive of this day.

You are both dismissed, and your names will be registered in order that you may never be again employed as officers of this Court. I trust that this sentence will operate as a warning to others.

#### 8 W. R., Cr. R., p. 35.

THE 8TH JULY, 1867.

Present.

The Hon'ble F. B. Kemp and F. A. Glover, Judges.

Kidnapping—Dishonestly taking property from person of Kidnapped child.

Queen versus Shama Sheikh.

Committed by the Magistrate, and tried by the Sessions Judge, of Moorshedabad, on a charge of kidnapping, &c.

The offence described in Section 363 of the Penal Code is included in that described in Section 369, the kidnapping and the intention of dishonestly taking property from the kidnapped child being included in the latter Section.

Kemp, J.—The prisoner has been convicted of kidnapping under Section 363, and of kidnapping with the intention of taking dishonestly moveable property from the person of the kidnapped child, under Section 369. Separate sentences have been passed under each Section.

The trial was with a Jury. The charge to the Jury seems to be a very proper one; but we think that the offence described in Section 363 is included in that described in Section 369, the kidnapping and the intention of dishonestly taking property from the person of the child being included in the latter Section.

The conviction and sentence under Section 363 is quashed.

8 W. R., Cr. R., p. 67.

THE 3RD SEPTEMBER, 1867.

Present.

The Hon'ble L. S. Jackson and C. P. Hobhouse, Judges.

False charge-Sections 182 and 211 Penal Code.

CRIMINAL REVISIONAL JURISDICTION.

Raffee Mahomed versus Abbas Khan.

Sections 182 and 211 of the Penal Code distinguished. The latter held to apply to a case of false charge in which the accused in the present case had appeared before the Police and charged the now complainant with having caused the death of the accused's child by poisoning.

Hobbouse, J.—The case referred to us is this:—The accused in this instance appeared before the Police and charged the complainant with having caused the death of his (the accused's) child by poisoning.

The Magistrate considered this was a false charge made with intent to injure complainant and with the knowledge that there was no foundation for it; and he found the accused guilty of an offence under Section 182, and sentenced him to six months imprisonment.

The Judge considers that the offence comes under the terms of Section 211 last part—an offence triable only by the Court of Sessions—and recommends that the order of the Magistrate be set aside, in order that the accused be committed to, and tried by, the Sessions Court for an offence under Section 211.

We concur with the Judge that the order of the Magistrate is illegal, and must be set aside.

Section 182 clearly refers to informations of which that given in illustration b. is an instance.

Section 211, on the other hand, as clearly refers to the exact case before us,—to the case of a person who, with intent to cause injury to another person, institutes a Criminal proceeding against that person on a false charge of an offence punishable with death, knowing that there is no just or lawful ground for such proceeding.

Such an offence is cognizable by the Court of Sessions alone, and not by the Magistrate; and we direct, therefore, that the order of the Magistrate be set aside.

This order bring thus set aside, the Judge can exercise his own discretion under Section 435, Code of Criminal Procedure.

# 9 W. R., Cr. R. p. 1.

. THE 1st DECEMBER 1867.

Present.

The Hon'ble F. B. Kemp and Dwarkanath Mitter. Judges. Criminal Trespass—Section 441 Penal Code.

Reference under Section 434 Code of Criminal Procedure from the Sessions Judge of 24 Pergunnahs in the case of Kalinauth Nag Chowdry.

In order to convict of criminal trespass under Section 441 of the Penal Code it must be proved that the property was in the possession of the prosecutor and that the entry was made with intent to "commit an offence or to intimidate, insult, or annoy any person in possession of the property."

Mitter, J.—This case has been before us under the provisions of Section 434 of the Criminal Procedure Code: The prisoner has been sentenced to a fine of 50 Rupees by the Deputy Magistrate of Busseerhaut on a charge of criminal trespass. On looking to Section 441, we find that it is necessary to prove two things before a charge of criminal trespass can be sustained. The property must be proved to have been in the possession of the prosecutor, and there must be evidence to show that the entry was made with intent to "commit an offence, or to intimidate, insult, or annoy any person in the possession of property." In the present case, there is no evidence to prove either of these two facts. The result of the

local investigation made by the Deputy Magistrate, even if it were admissible in evidence against the prisoner, does not show that the prosecutor was in possession of the land, nor is there any legal evidence to prove that the entry was made with a criminal intent. We do not see how the erection of a fence within the hollow of a drain, could have intimidated, insulted, or annoyed the prosecutor. At any rate, there is nothing to show that the prisoner had acted otherwise than bona fide in believing that the drain appearained to the land purchased by himself. We reverse the sentence passed by the Deputy Magistrate, and direct the refund of the 50 Rupees fine which has been imposed upon the prisoner.

11 W. R., Cr. R., p. 2. The 12th January, 1869.

#### Present.

The Hon'ble L. S. Jackson, and W. Markby, Judges.

False charge—Police Officer—Section 211 Penal Code.

CRIMINAL REVISIONAL JURISDICTION.

Nabodeep Chunder Sirkar, Petitioner.

Mr. R. T. Allan for Petitioner.

Section 211 of the Penal Code applies not only to a private individual but also to a Police Officer who brings a false charge of an offence with intent to injure.

Jackson, J-It seems to me that there is no ground for interfering with the proceedings of the Courts below. The petitioner is charged with an offence under Section 211 of the Indian Penal Code; and after hearing the papers that have been read to us, I think it is impossible to say that there was no evidence, and it was upon that evidence that the Magistrate, and Judge who heard the appeal, clearly found that the petitioner committed the act with which he is charged. Mr. Allan contends that the Section is one that applies only to private individuals, and that a Police Officer affecting to act in execution of his office cannot be brought within the purview of the Section. It appears to me, however, that a Police Officer who maliciously commences criminal proceedings against any person, or charges such person with an offence, or causes him to be charged falsely, not only commits the offence under Section 211, but commits it in a very aggravated form. I think therefore that the petition must be rejected.

Markby, J .- I am of the same opinion.



#### 11 W R., Cr. R., p. 11.

THE 17TH FEBRUARY, 1869.

Present.

The Hon'ble L. S. Jackson and W Markby, Judges.

Procedure—Land dispute—Title to land—Criminal trespass—Section 441, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Bhaugulpore.

The Queen versus Surwan Singh and others.

Held by Jackson, J., (setting aside the order of the Magistrate, Markby, J., dissenting,) that a Magistrate ought not to decline to go into a case of criminal trespass under Section 441 of the Penal Code, because the complainant did not make out his title to the land:—the offence may be committed in respect of property in a person's possession, even though such possession may not have originated in right.

Jackson, J.—In this case I think it clear that the Magistrate was wrong in declining to go into the complaint because the prosecutor did not first make out his title to the land.

The facts alleged were such as, if proved against the accused, might support charges of unlawful assembly, assault and criminal trespass.

The offence of crininal trespass is committed if a person enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult, or annoy any person in possession, &c.

I think it is not necessary that the complainant should prove his right to the property, but that the offence may be committed in respect of property in his possession even though such possession may not have originated in right.

The evidence in this case went to show that the prosecutor had been for a year or thereabouts in possession and had sown and cultivated the crop on the ground.

I am therefore of opinion that the Magistrate ought to have taken cognizance of the case, and if he believed the witnesses for the prosecution ought to have called on the accused for their defence.

The question remains whether this is a case in which we ought to interfere for the purpose of correcting the error. It seems to me that we ought to do so, for disputes relating to land are notoriously the most futile source of crime in Behar, and the public peace would be seriously affected if it were supposed that offences such as are charged in this case might be committed with impunity unless the complainant was prepared to make out his title to

the property in respect of which the offence of criminal trespass had been committed, and of course the Magistrate's argument does not even touch the other two offences which I have mentioned as chargeable in the circumstances of this case. I therefore think that the order of the Magistrate ought to be set aside, and he should be directed to proceed with the case according to law.

Markby, J.—In this case I am not prepared to say that the Magistrate was wrong in law in refusing to put the accused upon their trial in a criminal charge, and unless his decision be contrary to law, we have no power to interfere under Section 434, which is the provision under which this case comes before us.

On reading the depositions taken by the Magistrate, I find evidence which might have supported a commitment upon a charge that the accused were members of an unlawful assembly, and there is perhaps some slight evidence of an assault, but I have no reason to suppose that the Magistrate overlooked that evidence.

With regard to the offence of criminal trespass, I think the Magistrate was right, in the view which he took of the evidence, to abstain from committing the accused on that charge. I have already held, sitting with Mr. Justice Kemp, that, "if one person "forcibly enters upon property in the possession of another, and "there does an act with intent to annoy" (we ought to have said intimidate, insult, or annov) "the person in possession, he is guil-"ty of the offence specified in Section 441 without reference to "the question in whom the title to the land may ultimately be "found."-(1, Weekly Reporter, Criminal, 2) To that opinion I adhere, although 1 am aware that it involves a construction of the Section which gives to the word "trespass" an arbitrary meaning inconsistent with its ordinary use. But from the Magistrate having abstained from committing the prisoner on a charge of assault, or of being a member of an unlawful assembly, I infer that he disbelieved the evidence which tended to establish violence and a man who enters upon land which is in the possession of another, but which in good faith he claims as his own, cannot, as I conceive, be considered guilty of criminal trespass, simply on the ground that he does that which, if his claim be well-founded, he is as owner perfectly justified in doing, such as cutting crops, ploughing up land, and the like. Even if his claim be not wellfounded, but the intention is merely to assert his right, and not to insult, intimidate, or annoy the person in possession, he would not be guilty of the peculiar offence described in Section 441.

Upon the view, therefore, which, as far as I can gather, the Magistrate took of the facts of this case, I cannot say he was wrong

in law in refusing to proceed with the charge and in referring the parties to the Civil Court.

#### 11. W. R., Cr. R. p. 16.

THE 4TH MARCH, 1869.

Present.

The Hon'ble L. S. Jackson and W. Markby, Judges.

Procedure—Commitment—Trial of several prisoners together—False evidence.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Judicial Commissioner of Chota Nagpore.

The Queen versus Kureem and another.

The commitment and trial together of several persons who are charged with having given false evidence in the same proceedings, should be avoided. A Court of Session is competent to try separately prisoners who have been committed together.

Reference.—It appears to me that, as one of the offences with which the accused is charged is said to have been committed on 17th December 1868, and the other on the 5th February, and that as the charges are not quite identical, and should each be separately proved, the accused might be tried separately, and not in one trial. I therefore submit the proceedings, under Section 434 of the Criminal Procedure Code, with the view of the commitment being annulled, should the Court think proper to do so.

JUDGMENT OF THE HIGH COURT.

Jackson, J.—We think there is no necessity to set aside the commitment in this case.

It is quite competent to the Judicial Commissioner to try the prisoners, and he ought to try them separately; not, however, because the acts charged were committed on different dates, but because the offence of each is quite distinct, and must be separately dealt with.

The commitment and trial together of several persons who are charged with having given false evidence in the same proceedings is a very frequent error which the Courts of Session should be careful to avoid.

#### 11. W. R., Cr. R., p. 38. The 14th April, 1869.

Present.

THE Hon'BLE G. Loch and L. S. Jackson, Judges-Punishment—Sentence—Theft.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Hooghly.

The Queen versus Sheikh Mooneeah.

Where the accused stole property at night belonging to two different persons from the same room of a house, it was held that he could not be sentenced a separately as for two offences of theft.

Reference.—It appears that the prisoner broke into a house at Howrah and stole certain property which belonged to two separate persons. He was sent up for trial on separate charges with respect to the property of the two owners, and the Deputy Magistrate has recorded separate sentences for each offence. I agree with the Officiating Magistrate in thinking that the order of the Deputy Magistrate was illegal.

It appears that there was only one act of house-breaking, and that the property of the two owners was stolen from the same room. The two offences are supported by the same evidence, and therefore, under the rulings of the High Court, page 21, Prinsep's Code of Criminal Procedure, a verdict of guilty should have been entered upon one offence only, and a verdict of not guilty on the other counts.

In the present case the double offences consisted of house-breaking by night with intent to commit theft, and theft, and under the High Court rulings recorded in page 22, of Prinsep's Code of Criminal Procedure, to pass double sentences was erroneous.

The Deputy Magistrate's explanation is also forwarded. It appears that he is under a mistake in supposing that the two prosecutors occupied different sets of apartments at the time of the theft.

The evidence shows that Duncan's property was kept in Gorman's room, that the theft took place on the night of the 10th, and from Gorman's statement, that Duncan did not come into the house until the 11th.

Under these circumstances, as no appeal has been preferred to me in the case, I think that the sentences for the second offences of house-breaking and the two offences of their should be quashed,

JUDGMENT OF THE HIGH COURT.

Jackson, J.—We are of opinion that the convictions and sentences as for four separate offences are erroneous.

. The offence of the prisoner was one, viz., theft in a dwelling-house under Section 380, Indian Penal Code. We find no evidence of "house-breaking," as there is nothing to show how the prisoner entered and quitted the house. It only appears that he was seen climbing over the wall, but it is not shown that he entered through or left the house by any passage to which he gained admittance by such climbing.

The prisoner's offence is however greatly aggravated by the fact that he had lately been a servant of the prosecutor and availed him-self of the knowledge of the premises (knowing also that they were unprotected) in order to commit the theft.

We therefore set aside the convictions and sentences passed by the Deputy Magistrate, and instead thereof order that a conviction be entered under Section 380, Indian Penal Code, and that the prisoner be rigorously imprisoned for two years.

# 11 W. R., Cr. R, p. 39.

THE 26TH APRIL, 1869.

Present.

The Hon'ble L. S. Jackson and F. A. Glover, Judges. Sentence—Punishment.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Dinapore.

The Queen versus Bhoobun Mohun and two others.

Where a conviction has been had under two Sections of the Penal Code, in one of which only an alternative sentence of imprisonment or fine is allowed, a sentence of fine cannot be passed.

Jackson, J.—The Joint Magistrate has convicted the accused under Sections 147 and 325 of the Penal Code, but has inflicted only one punishment, viz., a fine of 500 Rupees in the case of Bhoobun, and 200 Rupees each in the case of the other two.

Had the conviction been under Section 147 only, the order of the Joint Magistrate would be right, that Section allowing the alternative punishment of either confinement or fine.

But on conviction under Section 325 the punishment must be imprisonment of one or the other description, and no option is given of substituting a fine in lieu of imprisonment.

The Joint Magistrate's sentence is therefore illegal and must be quashed. He is directed to pass a fresh sentence according to law.

> 11 W. R., Cr. R., p. 44. The 3rd May, 1869.

> > Present.

The Hon'ble J. P. Norman and E. Jackson, Judges.

Police Officer—Diary—Forgery.

The Queen versus Rughoo Barrick.

Committed by the Magistrate and tried by the Sessions Judge of Cuttack, on a charge of dishonestly using as genuine a forged document.

The false alteration of a Police Diary by a Head Constable was held to fall under Section 471 Penal Code, as the forgery of a document made by a public servant in his official capacity.

Norman, J.—The prisoner has been convicted of using a forged document under Section 471. He is the Head Constable of an outpost, whose duty it was to enter in the Police Diary the particulars of cattle impounded. On the 19th of July last, 73 buffaloes were driven to the pound, and on the following day an entry was made by Sewnarain Putnaik in the diary at the request of the prisoner to that effect. In the afternoon of the same day the owners of the buffaloes came to the Thannah and had some conversation with the prisoner, on which he requested Sewnarain Putnaik to alter the figures into 13. Sewnarain refused. But the alteration was subsequently made, and the fine for 13 buffaloes received and acknowledged in the Police books. The prisoner has been sentenced to 18 months' rigorious imprisonment.

On reading the petition of appeal, it appears to me that the conviction is correct. The alteration of the Police Diary may, in my opinion, be properly characterized as the forgery of a document made by a public servant in his official capacity. Had the entry been originally false, the conviction might have been under Section 218.

I dismiss the appeal. Jackson, J.—1 concur.

II W. R., Cr. R., p. 49. The 5th May, 1869.

Present.

The Hon'ble J. P. Norman and E. Jackson, Judges.
Contempt—Section 163 Code of Criminal Procedure—Section 179 Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Cuttack.

The Queen vs. Ruttun Sahoo.

Under Section 163 of the Code of Criminal Procedure if a Court before which the offence of contempt under Section 179 Penal Code is committed, considers that a sentence of imprisonment is called for, it should record a statement of the facts constituting the contempt and the statement of the accused, and forward the case to a Magistrate.

Norman, J.—Ruttun Sahoo, complainant in a case of culpable homicide against Sut Churn Acharjee, refused to answer questions put to him by Mr. Currie, the Assistant Magistrate investigating the case. For this offence Mr. Currie sentenced him to

'three months' imprisonment under Section 179 of the Indian Penal Code.

The Judge of Cuttack, Mr. Macpherson, sends up the papers to this Court under Section 434, pointing out that under Section 163 of the Code of Criminal Procedure, if the Court before which the offence under Section 179 was committed, considered that a sentence of imprisonment was called for, after recording a statement of the facts constituting the contempt and the statement of the accused person, it should have forwarded the case to a Magistrate.

There is no doubt that the conviction is wrong and that Mr. Currie ought not to have dealt with the offence himself. We quash the conviction and direct the release of the prisoner.

### 11 W. R., Cr. R., p. 51.

EX0(3)

THE 13TH MAY 1869.

Present.

The Hon'ble L. S. Jackson and W. Markby, Judges. Criminal Misappropriation.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Moorshedabad.

The Queen versus Bissessur Roy.

Baboo Rash Behary Ghose for the Petitioner.

A servant who retains in his hands money which he was authorized to collect, and which he did collect, from the debtor of his master. because money is due to him as wages, is guilty of criminal misappropriation.

Jackson, J.—In this case Bissessur Roy, who was a peon in the employ of Messrs. Lyall Rennie & Co. in their silk filature, was sent by their gomastah to realise, amongst other debts due to them, a debt of 8 Rupees and 3 Annas, from one Juswunt Shaikh. For the purposes of the present decision I will assume that the facts alleged are true. He realised this amount from Juswunt Shaikh. He gave Juswunt Shaikh, not the receipt with which he had been provided by the gomastah, but another receipt of his own in acknowledgment of the money. Returning to the factory he informed the gomastah that he had failed in collecting this particular debt, and he returned the gomastah his receipt.

Shortly afterwards, Bissessur Roy was discharged from the employ of Messes. Lyall Rennie & Co., and after his discharge, it was ascertained that he had received from Juswunt Shaikh the particular sum in question.

On these facts he was charged before the Joint Magistrate with

criminal misappropriation, and the Joint Magistrate considered that the charge could not be sustained because he found that the prisoner, previous to his discharge, had a claim against Messrs. Lyall Rennie & Co. for wages to the amount of 8 Rupees 3 Annas and 1 pie, being 1 pie in excess of the amount which he had appropriated. From this the Joint Magistrate argues that there was probably no dishonest intention on the part of Bissessur, inasmuch as he may fairly have considered himself entitled to repay himself out of the amount which he had recovered. The Joint Magistrate goes to say that in his opinion the peon was quite as much entitled to keep back the money realised by him on account of his masters, as his masters were entitled to keep back the wages due to him.

It seems to me that the view taken by the Joint Magistrate is manifestly erroneous, supposing the fact to be true as alleged, and that the circumstance of the prisoner keeping back the proper receipt from Juswunt Shaikh and his denial to the gomastah that he had recovered the money, completely disposes of the supposition that he could have had any honest belief that he was entitled to keep back the money and show that he did keep it with what the Magistrate calls an animus furandi. It would be most mischievous if the law were understood to be as supposed by the Joint Magistrate, that servants employed in collecting their master's debts were at liberty to keep back such debts, when collected, in satisfaction of claims of their own, and to inform their masters that the amounts so kept back had not been realised from their debtors. It seems to me, therefore, quite clear that the Joint Magistrate was utterly wrong; that his decision declaring the charge to be not maintainable cannot be supported; that that decision must be set aside; and that the case must go back to him in order that he may come to a decision upon the facts and pass such further order as the case may require.

Markby, J.-I am entirely of the same opinion.

12 W. R., Cr. R., p. 1. THE 1st JUNE, 1869. Present.

The Hon'ble J. P. Norman and E. Jackson, Judges. Mischief—Section 425, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Moorshedabad.

The Queen versus Denoo Bundhoo Biswas and others.

Before a conviction can be had for mischief under Section 425 of the Penal Code, it must be proved that the accused intended to cause, or knew that he was likely to cause wrongful loss (Section 23. Penal Code.)

Norman, J.—The prisoners, servants of the Zemindar of Bally have been convicted of committing mischief by destroying a bar of bamboo laid across a water course.

The Deputy Magistrate finds that there is a dispute about a right of fishery in the water-course between the Zemindar of Bally and the Zemindar of Maharajpore; that the Zemindar of Maharajpore, having set up a bar across the water-course, which obstructs the egress and ingress of fish while it allows the water to pass freely, the defendants, being unable to induce the Police to interfere, threw down the bar.

Before the Deputy Magistrate, the defendants produced a decision of the Sudder Ameen of Moorshedabad, affirmed by the Judge on appeal, to show that the fishery belonged to the Zemindar of Bally. The Deputy Magistrate said it was unnecessary for him to go into a question of title, and adds that the decision to which the Zemindars of Maharajpore were not parties is not evidence against them. He says the evidence does not clearly establish the fact of exclusive possession of either party; that even supposing the Zemindar of Bally to have been in exclusive possession, it does not follow that the removal of the bar was justified. He says that the prisoner Denoo Bundhoo should not have taken the Law into his own hands. He fined the prisoners 10 Rupees each.

The Magistrate, Mr. Hankey, has sent up the case under Section 434.

We think that the conviction cannot be sustained. The conviction does not show that the prisoners threw down the bar with intent to cause, or knowing that they were likely to cause, wrongful loss within Section 425. Wrongful loss is defined to be the loss by unlawful means of property to which the person losing it is legally entitled.

The conviction does not show on the face of it whether the mischief for which the defendants have been convicted is the damage to and loss of the bar, or mischief to the fishery. Suppose it to be the injury to or loss of the bar. If the fishery belonged to the Zemindars of Bally and they were in possession, servants acting under orders might lawfully remove an obstruction newly set up to the passage of fish to prevent injury to their property and interference with its enjoyment.

In Blackstone's Commentaries, Book 3, Chapter I, it is said: "Whatsoever unlawfully annoys or doth damage to another is a

"nuisance, and such nuisance may be abated, that is, taken away by the party aggrevied thereto, so that he commits no riot (or breach of the peace) in doing it. If a new gate be erected across a public high-way, which is a common nuisance, any of the King's subjects passing that way may not cut it down and destroy it."

It is not found that the defendants wantonly destroyed or injured the bar, the whole cost of which is stated to have been about a rupee in removing it.

Suppose the mischief for which the Deputy Magistrate intended to convict is mischief to the fishery.

First.—The Deputy Magistrate has not found or even enquired whether the Zemindars of Maharajpore are legally entitled to the fishery. If not, no wrongful loss was inflicted on them.

Secondly.-It is entirely consistent with the finding of the Deputy Magistrate that the defendants were acting in good faith for the protection of their master's interests, and repelling what they believed to be an unlawful intrusion on the part of the Zemindars of Maharajpore. If the defendants really acted in the belief that the fishery belonged to their master, the Zemindar of Bally, it cannot be said that in removing a bar which interfered with that fishery, they acted with intent to cause, or knowing they were likely to cause, injury to the Zemindars of Maharajpore. Admitting that the decision of the Sudder Ameen is not evidence on a question of title as against the Zemindars of Maharajpore, it may well have led the defendants to suppose that their master had a legal right to the fishery, and should have been considered by the Deputy Magistrate with reference to the question of the good faith of the defendants, whether they acted with intent to cause or knowing they were likely to cause, injury to the Zemindars of Maharajpore.

The Deputy Magistrate finds that the parties were jointly in possession. If the act had been in its nature a malicious and wanton one, which could have had no other object than that of the injury or destruction of the property, or to prevent the title to the property being ascertained, or otherwise to injure the Zemindars of Maharajpore, we have no doubt that the parties might have been convicted as in the illustration.

When A, having joint property with Z, in a horse, shoots the horse intending thereby to cause wrongful loss to Z, A has committed mischief.

In the present case we think no intent to injure or knowledge that injury would be caused to the Zemindar of Mahrajpore appears. The act is even presumably done with a totally different object.

The conviction is therefore bad, and must be quashed and the fines repaid.

#### 12 W. R., Cr. R , p. 27.

THE 10TH JULY 1869.

Present.

The Hon'ble L. S. Jackson and W. Markby. Judges.

Procedure—Wrongful confinement—Absence of Prosecutor—Section 347, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Sylhet.

The Queen versus Bedoor Ghose.

A Deputy Magistrate has no power to dismiss in default of prosecution a charge laid under Section 347 of the Penal Code of wrongful confinement for the purpose of extorting money.

Where the evidence of a prosecutor and his witnesses is taken in the presence of the accused, and the case is postponed by the Court for the evidence of witnesses for the defence, the case ought not to be dismissed for default of prosecution if, on the day to which it has been postponed, the prosecutor is not present.

Reference by the Magistrate.—One Dhan Chung, on 18th March, complained at the Chuttuck Police Station that Bedoor Ghose, Sheik Adil, and others, had wrongfully confined his relative, Lochun Chung, for the purpose of extorting money. The Police entered the case under Section 342 and though they reported it true, sent it up in B form, as they said it was not proved. On April 1st, the Acting Magistrate ordered the paper to be filed; but on April 2nd, Lochun Chung himself presented a petition, stating that he had been confined in various places to make him pay his rent, and having been released by the Police now brought a charge under Sections 352 and 347.

The Police reports were examined, and on April 6th, the sworn deposition of Lochuh was taken, and summonses on five men, named Bedoor, Muthan, Naro, Adil, and Beparee, were issued, and April 15th fixed for the trial.

On that day all the parties being present the case was made over to the Deputy Magistrate who on the 17th and 19th took the evidence of the prosecutor and his witnesses, and on the 19th holding the accused to bail, postponed the case till May 13th for the evidence of two persons whose evidence was considered necessary by the Court.

On May 13th he dismissed the case and discharged the accused, because the complainant was not present. On that same day (May 13th) the complainant, Lochun Chung, applied to the Joint Magistrate (who was in charge of the current duties of my office) stating that he had been present all day in the Deputy Magistrate's office, and that not his name but that of *Dhan Chung* (the original informant at the Police Station), had been called out, and because he had not answered it, the case had been dismissed.

There are three illegalities at least in the Deputy Magistrate's proceedings:—

- (1). He had no power to dismiss in default of prosecution a charge laid under Section 347.
- (2). Having taken the evidence of a prosecutor and postponed the case for the evidence of other parties to a future date, he had no power to dismiss any case in default of prosecution: the prosecutor having given his deposition in the presence of the accused, and having produced his witnesses, the case should then have been decided on its merits.
- (3). The prosecutor's name entered on the fly-leaf of the case was Dhan Chung the actual prosecutor was Lochun Chung, and Lochun's name ought to have been called out, not Dhan's. In the matter of calling the names I fully believe Lochun's story as it is corroborated by his subsequent behaviour and by the record.

Under these circumstances, I beg that you will submit the case to the High Court under Section 434, in order that the Deputy Ma-

gistrate's order of dismissal may be quashed.

The irregular proceedings of the Deputy Magistrate in delaying the examination of the witnesses from April I6th to 19th has been noticed.

Remarks by the Sessions Judge.—I am of opinion that the irregularities and illegalities pointed out by the Magistrate are sufficient to quash the order of dismissal passed by the Deputy Magistrate.

JUDGMENT OF THE HIGH COURT.

Jackson, J.—We agree with the Magistrate and the Sessions

Judge.

We quash the order of the Deputy Magistrate dismissing the complaint for default, and direct that he proceed herewith accordding to Law.

----

#### 12 W. R., Cr. R., p. 49. The 28th August, 1869.

#### Present

The Hon'ble F. B. Kemp and F. A. Glover, Judges.

Order by Public Servant—Section 188 Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Backergunge.

The Queen versus Ramtonoo Singh, peon.

Before a conviction can be had under Section 188 Penal Code, it must be proved that the accused knew that an order had been promulgated by a public servant directing such accused person to abstain from a certain act.

Kemp, J.—The conviction of the Deputy Magistrate cannot stand. Under Section 188 of the Indian Penal Code, it is necessary that the person convicted of an offence under that Sections should be proved to have known that an order had been promulgated by a public servant directing such person to abstain from a certain act. No evidence whatever was taken in this case to bring home the knowledge of the order to the accused. The conviction is quashed and the fine must be refunded to Ramtonoo Singh, peon.

### 12 W. R., Cr. R., p. 54. The 21st September, 1869. Present.

The Hon'ble E. Jackson and Dwarkanath Mitter, Judges.

Procedure-Recognizance-Evidence.

CRIMINAL REVISIONAL JURISDICTION.

Application under Sections 404 and 405 of the Criminal Procedure Code to revise the proceedings of the Magistrate of Dacca.

Kalikant Roy Chowdhry, Petitioner.

Baboo Kalee Mohum Doss for the Petitioner.

Baboo Anund Chunder Ghose for the Opposite Party.

There must be a regular judicial trial and legal inquiry before an order to forfeit recognizances can be passed and the evidence taken should be recorded in the presence of the accused or in the presence of an agent of the accused duly authorized to appear in such inquiry.

Jackson, J.—This is an application to this Court to revise the proceedings of the Magistrate of Dacca passed against the applicant, Kally Kant Roy Chowdhry. Both the orders passed by the Magistrate are dated 14th of June 1869. In one of them, the applicant was ordered to forfeit his recognizances for 1,000 Rupees which he was ordered to pay, or on failure, to suffer imprisonment for a period of six months. By the other he was required to furnish security to the extent of 5,000 Rupees to keep the peace

for 20 months. The period of 20 months appears from a proceeding of the Sessions Judge to have been since changed to one year.

The Magistrate recorded in his decision the grounds upon which he has passed these orders. It is enough to say that from that decision it is quite clear that no evidence was recorded in the presence of the accused before those orders were passed upon him.

The accused was called upon to show cause why his recognizance should not be forfeited. He appeared and did show cause. If the Magistrate still considered that the recognizances should have been forfeited, it was his duty to record the evidence upon which it was proved that the accused had acted in such a way that it became necessary to forfeit that recognizance for 1,000 Rupees. There must be a regular Judicial trial and legal inquiry before such punishment can be inflicted. Similarly, it has been lately held by a Full Bench of this Court that even before recognizances are required from any person from whom a breach of the peace is apprehended, there must be some evidence before the Magistrate that such breach of the peace is likely to occur.

It may be that a defendant may make certain admissions upon which the Magistrate can assume that a breach of the peace is likely to occur, and in such a case the Magistrate might act upon such admission. But where the accused denies the charge, it is incumbent upon the Magistrate to record the legal evidence; proving that he was about to do something which would cause a breach of the peace, before recognizances or security can be taken from him.

In this case the Magistrate has taken certain depositions out of another trial and has placed those depositions on the record of this trial as evidence against the accused. But they are manifestly no legal evidence against him. They were not taken in his presence or in the presence of any mooktear duly authorized by him on this trial. The Magistrate states that they were taken in the presence of mooktears employed by the defendant. But they were taken long before the defendant was called upon to answer the charge, and not taken upon this trial. Such deposition, therefore, cannot be any evidence whatever against the accused.

If the defendent has really forfeited his recognizances the Magistrate must take evidence upon the point and pass orders upon him. He must proceed in the same way if it is necessary to take further recognizances from the defendant.

The orders now passed by the Magistrate, dated 14th June 1869, are reversed.

#### 12. W. R., Cr. R, p. 75. The 10th December, 1869.

TO /

Present.

The Hon'ble J. P. Norman and F. B. Kemp, Judges.

Unlawful assembly—Riot—Liability of owner of land—Procedure—Trial—Right to Cross-examine—Sections 141 and 154, Penal Code.

CRIMINAL REVISIONAL JURISDICTION.

The Queen versus Surroop Chunder Paul and Heera Lall Paul.

Mr. W. Bourke and Baboo Rash Behary Ghose for Petitioners.

Held, that the owner or occupier of land on which an unlawful assembly is held, cannot be convicted under Section 154 of the Penal Code, unless there is a finding that the riot was premeditated.

Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly and to try them together, inasmuch as they do not have "one common object" within the meaning of Section 141 of the Penal Code.

The right of an accused party to cross-examine witnesses is limited to a right to cross-examine the witnesses for the prosecutor or for the Crown called against him. If he wishes to avail himself of evidence which has been given, or which can be given, by a witness called for another of the parties accused, he must call him as his own witness.

Norman, J.—This case was sent for under Section 434 of the Code of Criminal Procedure upon a suggestion by Mr. Bourke, Counsel for Baboo Surroop Chunder Paul and for Baboo Heera Lall Paul, that there was error in the decision of the case by the Lower Court upon a point of law.

The defendants, Surroop Chunder Paul and Heera Lall Paul, were convicted by the Magistrate under Sections 154 and 155 of the Indian Penal Code,—the charge under Section 154 being that they were owners of land on which an unlawful assembly was held, whose agent or Manager, Baboo Rakhal Doss Roy, knowing that an unlawful assembly or riot was about to take place, did not use all lawful means in his power to prevent it, and when it did take place, did not take all lawful means in his power to disperse or suppress the riot.

The Judge on appeal reversed the decision of the Magistrate under Section 155 and allowed the conviction to stand under Section 154, and under that Section the defendants were sentenced to pay a fine of Rupees 1,000 each.

The Judge in appeal finds that the riot was not premeditated and on the question whether their agent used all lawful means in his power to disperse or suppress the riot, he says. "Now it "is not attempted to be shown that their agent Rakhal Doss Roy

"did anything more towards dispersing or suppressing the riot than telling the Chowkedar Saboo to see that there is no row and make haste to give information to the Police. Giving him the full benefit of this evidence, I cannot believe that this was all that he could do. Undoubtedly he might have taken active steps to stop the disturbance, and if he had done so the serious results which followed might probably have been avoided. I therefore reject this appeal so far as regards the conviction under Section 154. It is of the utmost importance that all persons should understand that they are bound to use all lawful means to prevent a breach of the peace on all occasions."

For my part I fully concur in that observation, and it is not without some regret that I feel myself compelled to reverse the decision of the Judge because where riot and bloodshed take place as the result of a stand-up fight between the partisans of two rivals Zemindars, where, as is too often the case, and as the Magistrate has found, was the case here, lattials are employed on both sides, there can be little or no doubt that the riot is, if not for the benefit of, at least mainly instigated by, the Zemindars or their agents.

If the finding of the first Court had stood, namely, that hired latticals retained by each party, were members of the unlawful assembly, some of them actively engaged as combatants on the side of the Paul defendants party, there could be no doubt of the propriety of the conviction under Section 154. There would be no doubt that the finding that such men were retained would have been quite sufficient to justify the inference that the Zemindars and their agents, so far from using all lawful means in their power to prevent the riot, had made preparations beforehand to enable their faction to take an effective part in it.

The Judge finds that the riot was unpremeditated. He does not find what, if any, were the lawful means to which Rakhal Doss Roy, the servant of the Zemindar, could have resorted in order to suppress the riot or disperse the rioters. It is a fact that the Police were stationed in the village, and it is found by the Judge that news of the riot was sent to the Police by Rakhal Doss. It may be that Baboo Rakhal Doss Roy might have used his influence with the ryots of the Paul party, and by that influence might have induced them to disperse and cease from rioting. But there is nothing to show that he had any such influence and could have induced them to disperse, or that he wilfully kept out of the way leaving the riot to take its own course. If we allowed the conviction to stand, it would be on some bare

conjecture that he might have had some means of dispersing the riot, of which there is no evidence. Therefore it seems to me that on the Judge's finding, the conviction cannot stand.

There is a second objection taken by Mr. Bourke which I think of considerable importance, because it illustrates the inconvenience of a practice, which is very common upon charges of riot, namely. Treating the attacking party and resisting party as constituting one unlawful assembly and trying them together. Each party constitutes an assembly having an object totally distinct from that of the other party, and the responsibilities under which the several parties may come under Section 149 are totally distinct.

In the present case a fight took place between Mr Anderson's men and the party of the Paul defendants. It is quite plain that the two assemblies did not constitute one unlawful assembly. They had not within the meaning of Section 141 "one common object." It is suggested that the object of the Anderson's party was to beat, ill-use, and over-awe the ryots of the Paul party, to compel them to cultivate the indigo, while the object of the party of the Paul Zemindars was either to resist and drive off, or to wreak their revenge on Anderson's party. The Paul party had no common object with the Anderson's party.

When the witnesses for the defence of Mr. Anderson's party were called, the vakeels for the Paul defendants' party wished to cross-examine the witnesses called for the defence of Mr. Anderson's men, and not unnaturally as it was probably impossible for the witnesses for Mr. Anderson's party to avoid making statements which would tend to fix charges on the Paul party. The Magistrate refused the application by the Paul defendants' vakeels to cross-examine Mr. Anderson's witnesses, and as I think properly refused it. This matter has been considered on the original side of the Court, and it has been held that the right of a defendant to cross-examine is limited to a right to cross-examine the witnesses of the plaintiff or of the Crown called against him. If he wishes to avail himself of evidence which has been given of which can be given, by a witness called for another defendant, he must call him as his own witness.

On the second day the witnesses of the Paul party were called and the vakeel of Mr. Anderson's party claimed a right to cross-examine those witnesses. The Magistrate, reconsidering his former determination, permitted such cross-examination. Thereupon it was objected by the vakeels of the party of the Paul Zemindars that they ought to have been allowed to cross-examine the witnesses called for the defence of Mr. Anderson's party. The Magistrat

decided that he would allow the witnesses to be recalled and cross-examined, but it was ultimately arranged that the case of each prisoner should be tried and considered separately without advertence to the evidence for the defence of any other party. So far as prisoners can assent to anything that arrangement was assented to by the vakeels of each party. I do not rely on any consent. I think that the course ultimately taken was the correct course.

The matter was brought to the notice of the Judge who has stated his view of it, as I think a very just and proper view, in the following words:—

"A preliminary objection is raised by both Counsel that the "case cannot proceed in its present form as the witnesses for the "defence summoned by the defendants connected with Mr. An-" derson and with the Paul Zemindars party respectively were not " allowed by the Magistrate to be cross-examined by the pleaders " retained for the defence; and it is urged that as the defence set "up on each side is that whatever was done was in the right of " private self-defence, the Court cannot arrive at any satisfactory " conclusion without causing such cross-examination to be allowed. " But it appears to the Court that the correct principle upon which "it should act under the circumstances is to deal with the case "according to the evidence adduced for the prosecution modified, " so far as that may be in the opinion of the Court, by the evi-" dence adduced by each party in its defence. The Court entirely "admits, and will in considering its judgment thoroughly adopt, " the principle that none of the evidence for the defence can be used "against any other person than the person on whose behalf it is " produced "

But even if there was no error in dealing with the evidence as given on the examination and cross-examination of the witnesses in the case, it appears to me that when two hostile parties concerned in a conflict are placed on their trial at the same time they are still virtually arrayed against each other.

There is great danger that the mind of the Judge may be more or less influenced in the trial of one set of defendants by the evidence given for the defence of the other set of defendants. And although no doubt the Judge has a discretion in the matter, we think that discretion in cases like the present would be better exercised by trying each set of defendants separately.

The conviction of Surroop Chunder Paul and Heera Lall Paul must be quashed upon the ground that on the finding of the Judge

there is nothing to show that their agent Rakhal Doss had any means of suppressing the riot which he did not use. The amount of the fines, if levied from them, must be returned.

As to the appeal of the ryots, the only objection being that they were not allowed to cross-examine the witnesses called by the other party, I see no reason to interfere, and their appeal is therefore rejected.

Kemp, J.—I concur in the remarks of my learned colleague with reference to the appeal of the ryote.

I also concur in quashing the order of the Sessions Judge under Section 154 on the appeal of the Paul appellants, but for my part I feel no regret whatever in setting aside the decision of the Judge in this case with reference to the Pauls.

I fully admit the duty which the law imposes on Zemindars and the obligation on the Court to administer that law with wholesome severity. I also admit that by the mere fact of the Zemindar's not residing on his estate he cannot avoid the liability which the law imposes.

In this case the Zemindar has been fined for an act committed by his agent.

Now, it is admitted that the Police were on the spot before the riot. Whether they were deputed by the Magistrate himself or whether they were sent on the application of the rival Zemindars does not appear, but they were there.

The Judge also finds that the riot was unpremeditated and there is also evidence to show that the agent did direct the Chowkedar to suppress and disperse the riot or unlawful assembly, and also to take steps to inform the Police of the same. I therefore wholly fail to see how he has neglected to use all lawful means in his power, within the meaning of Section 154, to disperse or suppress the riot. It cannot be expected, that a Bengalee naib should personally attempt to suppress a riot between two parties, who suddenly and in great numbers and armed with deadly weapons choose to have a stand-up fight. The only means in the power of the naib is to invoke the aid of the Police, and this the naib did in the present case; and having done so, I think that his conviction under Section 154 was clearly wrong.

With these remarks I concur with my learned colleague in quashing the conviction, and in directing that the amount of the fine should be returned to the Paul defendants.

#### MADRAS HIGH COURT REPORTS, VOL. I, PAGE 30. 27th October, 1862.

### APPELLATE JURISDICTION.

Present:—Scotland, C. J. and Phillips, J.

The Queen against Subbana Gaundan and others.

To constitute the offence of preferring a false charge, under Section 211 of the Penal Code, the charge need not be made before a Magistrate. Nor need the charge have been fully heard and dismissed: it is enough if it is not pending at the time of the trial.

The peritioners were convicted under Section 211 of the Penal Code (Act XIV of 1860), by S. N. Ward, the Sessions Judge of Coimbatore, for falsely charging the prosecutor with having committed the offence of highway robbery, knowing that there was no just or lawful ground for such charge. The charge had been preferred before an Inspector of Police, who disbelieved and refused to act upon it.

Section 211 of the Penal Code enacts that "whoever with intent to cause injury to any person, institutes, or causes to be instituted, any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished "as therein mentioned.

Branson for the petitioners. The conviction was wrong, for, first it did not appear that the charge was made before a Magistrate, and, secondly, it did not appear that the charge was finally disposed of in the prosecutor's favour, and this it would be necessary for the plaintiff to prove in the case of an action for a malicious prosecution.

Scotland. C. J:—To constitute the offence of preferring a falee charge contemplated in Section 211 of the Penal Code, it is not necessary that the charge should be before a Magistrate. It is enough if it appear, as it does in the present case, that the charge was deliberately made before an Officer of Police, with a view to its being brought before a Magistrate. Of course a mere random conversation or remark would not amount to a charge. As to the other point it is said that it must appear that the charge was fully heard and dismissed. That is not necessary. It is enough in a case like the present if it appear that the charge is not still pending. An indictment for falsely charging could not be sustained if the accusation were entertained and still remained under proper legal enquiry. Here the facts that the Inspector of Police refused to act upon the charge, and that no further step was taken, are enough to bring the case within Section 211.

Phillips, J.—Concurred.

# MADRAS H. C. R., VOL. 2, P. 247. APPELLATE JURISDICTION.

THE 26TH NOVEMBER, 1864.

Present:—Phillips and Holloway, J. J.

Exparte Kapalavaya Saraya.

A settlement of accounts in writing, though not signed by any person, is a "valuable security" within the definition of Section 30 of the Indian Penal Code.

The petitioner was charged with having destroyed a valuable security before the Session Judge of Rajahmundry, and sentenced to two years' imprisonment under Section 30 of the Indian Penal Code. The valuable security was a settlement of accounts in the

hand-writing of the prisoner, though not signed by him,

Sloan, for the petitioner. Section 30 of the Indian Penal Code was as follows:—"The words valuable security denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released or whereby any person acknowledges that he lies, under legal liability, or has not a certain legal right." He contended that a settlement of account was not a valuable security in the terms of the Section. There was no direct promise to pay, and nothing appeared on the face of the instrument itself whereby any legal right or liability was created. [Hottoway, J:—What is meant by the words "or purports to be" used in that Section?] The instrument should contain a direct promise to pay, or should purport to create an obligation on the face of it. Otherwise the word "whereby" did not apply. He referred to Cowper v. Lord Cowper (a).

Holloway, J :- In this case there is evidence that a certain document was torn up by the prisoner. There were three persons present when it was torn and they all swear to it. In order to determine what the nature of the document was, there is only the evidence of the prosecutor, but that case is materially fortified by the act of the pri-oner which showed how important he thought it to get the document out of the way. There is also evidence that the document was in the hand-writing of the prisoner. With reference to the argument that this is not a valuable security because it does not contain a promise to pay, we do not think it ought to prevail. The document did not convey any right itself. It merely evidences an obligation upon which the right follows. When A. and B. settle accounts and a balance is found due what is the meaning of that? It is a distinct acknowledgment of an obligation to pay the sum so found due, I entertain no doubt that an account stated in which a balance is admitted to be due in the hand-writing of the prisoner is a valuable security.

Phillips J.—Concurred.

Petition dismissed.

<sup>(</sup>a). 2 Piere Williams, 720.

#### MADRAS H. C. R., vol. 2, p. 438.

THE 12тн August, 1865.

#### APPELLATE JURISDICTION.

Present:—Frere and Innes, J. J.

Andy Chetty ... Prisoner

The prisoner asked a witness to suppress certain facts in giving his evidence against the prisoner before the Deputy Magistrate on a charge of defamation. Held that this was abetment of giving false evidence in a stage of a judicial proceeding and was triable before a Court of Session only.

This was a petition against the sentence of G. Ellis, Session Judge of Cuddalore, in Case No. 129 of the Calendar for 1865. *Miller*, for the prisoner.

JUDGMENT:—The prisoner was charged before the Deputy Magistrate with having abetted the making a false statement on oath before a public servant and thereby committed an offence under Section 181 of the Indian Penal Code. This conviction was confirmed on appeal by the Session Judge. Appeal is made to us on the ground, that the conviction is illegal, the offence not being one which would properly fall under Sections 181 and 116.

The prisoner asked the first witness to suppress mention of certain facts in giving his evidence against him before the Deputy Magistrate, in reference to a charge of defamation, and this constitutes abetiment of giving false evidence in a stage of a judicial proceeding, which is expressly excepted from the jurisdiction of all Courts but the Courts of Session.

Section 181 would appear to apply to cases in which the proceedings were not of a judicial character, such as proceedings before a Commissioner of Income Tax.

The case being one which involved an offence triable by the Session Court alone, the Deputy Magistrate had no jurisdiction, and we shall therefore quash the sentence.

It is accordingly ordered that the sentence of the Deputy Magistrate be, and the same hereby is, cancelled.

## MADRAS H. C. REPORTS, VOL II, PAGE 331.

24TH FEBRUARY, 1865.

#### ORIGINAL JURISDICTION.

Present:—Scotland, C. J. and Bittleston, J.

The Queen against Kumarasami.

Upon an indictment under Section 498 of the Indian Penal Code charging that the prisoner took away one A. who was then and whom he then knew to be the wife of one M. with the intent that he might have illicit intercourse

with the said A. Held that, there was a taking within the meaning of the Section although the advances and solicitations had proceeded from the woman and the prisoner had for some time refused to yield to her request.

Case stated by Bittleston, J.

"The prisoner Kumarasami was tried before me at the last Criminal Sessions upon an indictment which charged under Section 498 (a.) of the Penal Code that he took away one Agilandam who was then and whom he then knew to be the wife of one Muttusami Mudali from the said Muttusami Mudali with the intent that he might have illicit intercourse with the said Agilandam.

It appeared in evidence that the prisoner and one Ramasawmy, who were neighbours of the prosecutor, met his wife Agilandam in the street on the 17th November last, she having left her husband's house to fetch water, that the three went together by Railway to Vellore and Arcot where the prisoner and Agilandam remained about 12 days and where sexual intercourse took place between them, but Ramasawmy swore and the Jury found as a fact that Agilandam asked the prisoner to allow her to go with him, that all the solicitations proceeded from her and that the prisoner for some time refused to yield to her request.

I told the Jury that this did not in my opinion exonerate the prisoner from the charge, that the 498th Section of the Code was framed for the protection of the hu-band and that though the request and solicitations came wholly from the wife, yet as the prisoner had yielded to it and gone away with her, there was a sufficient taking on his part within the meaning of the Section. The Jury found the prisoner guilty, and I sentenced him to six weeks' simple imprisonment, but feeling some doubt whether my direction was right I have reserved the question for the consideration of the High Court."

No counsel appeared.

The Judgment of the Court was given by Sir C. H. Scotland.—I do not think that the facts found of the woman having been the

<sup>(</sup>a.) The Section is as follows:--

<sup>&</sup>quot;Whoever takes or entices away any woman who is, and whom he knows or has reason to believe to be the wife of any other man from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

tempter and the prisoner in the first instance reluctant to yield to her solicitations can render the case different from one in which the advances and solicitations are on the part of the man and the woman complies and willingly leaves her husband and cohabits with the man. All that can be said is that her consent is given under circumstances of greater profligacy in the one case than in the other. In this case, therefore, it seems to me the real point for consideration is simply whether the wife's willingness and consent, evidenced by her solicitations of the prisoner and the circumstances under which she left her husband and remained absent from him, afford any defence to the prisoner.

Now the Section and the preceding Section (497) (b.) were evidently intended for the protection of husbands who alone can institute prosecutions for offences under them. It is the taking or enticing of the wife from the husband or the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. If whilst the wife is living with her husband a man knowingly goes away with her in such a way as to deprive the husband of his control over her with the intent stated in the Section, that, I think, is a taking from the husband within the meaning of the Section. The wife's complicity in the transaction is no more material on a charge under this Section than it is on a charge of adultery. For these reasons, I think, the conviction must be affirmed.

Conviction Affirmed.

This Section is omitted in the Straits Penal Code.

S. L.



<sup>(</sup>b.) Section 497 is as follows:-

<sup>&</sup>quot;Whoever has sexual intercourse with a person who is, and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years or with fine, or with both. In such case the wife shall not be punishable as abettor."

# HIGH COURT OF CALCUTTA.

8 W. R., Cr. R., p. 7.

THE 4TH JUNE, 1867.

Present.

The Hon'ble L. S. Jackson and C. P. Hobhouse, Judges. Breach of Contract—Act XIII of 1859—Coolies in Assam. Reference under Section 434 Code of Criminal Procedure.

Queen versus Gaub Gorah Cacharee and others.

Coolies in Assam who have received advances in contemplation of work to be done, may be proceeded against under Act XIII of 1859.

Jackson, J.—We think there is nothing in the terms of Act XIII of 1859 to support the view taken by the Judicial Commissioner.

It appears to us that the Legislature, in taking measures for the protection of employees who have made advances of money in contemplation of work to be done, advisedly employed the widest terms to designate the person receiving such advance: in using the words artificer, workman, or laborer, they evidently intended to include labor, as well unskilled as skilled, and in extending or making it legal to extend the operation of the Act to a region like Assam where labor would be chiefly agricultural or out-door labor, they doubtless had in view the common cooly whose services it is necessary to secure by an advance.

We do not quite understand what is meant by the Judicial Commissioner's expression "work of a specific character," but the 4th. Section of the Act provides that the contract to be enforced may be for a certain term, or for special work or otherwise.

Probably, the work of a garden cooly is something well understood in Assam, and the work would, in that case, be of a specific kind, even if that were necessary.

We are of opinion that the Deputy Commissioner was competent to summon the coolies complained of, and to make an order under the 2nd and 3rd Sections of the Act.

# 8. W. R., Cr. R., p. 45.

THE 22ND JULY, 1867.

Present.

The Hon'ble L. S. Jackson and C. P. Hobhouse, Judges. Municipal Act—Nuisances.

CRIMINAL REVISIONAL JURISDICTION.

Queen versus Brojo Lall Mitter

The occupier who suffers the land to be in a filthy state, is the person liable for penalty.

Jackson, J.—There is nothing on the record before us to show that the petitioner is not the occupant of the land; but as Mr. Haldane, the Vice-Chairman who appears on behalf of the Municipal Commissioners, admits for the sake of obtaining an expression of the Court's opinion that there was an occupier, we proceed to give our decision in the case stated.

It appears to me that the occupier who suffers the land to be in a filthy state, is the person liable for the penalty, because the words "owner and occupier" are only words qualifying the main proposition which is "whoever suffers any house, building, or land in or near any public highway in a filthy state."

Therefore when land has been leased by the owner to some one else who is an occupier, the Commissioners ought to proceed against the occupier, I am therefore of opinion, supposing the fact to be, as stated in the petition, that the petitioner was wrongfully convicted, that the fine ought to be refunded.

Hobhouse, J .- I concur.

# 8 W. R., Cr. R., p. 69.

THE 7TH SEPTEMBER, 1867.

Present.

The Hon'ble L. S. Jackson, and C. P. Hobhouse, Judges.

Act XIII of 1859—Advances worked off.

CRIMINAL REVISIONAL JURISDICTION.

Tara Doss Bhuttacharge, on behalf of Messrs. Lyall & Co.

Versus

#### Bhaloo Sheik.

Act XIII of 1859 relates to fraudulent breaches of contract, and does not apply where an advance has not only been worked off by a laborer, but an actual balance is due to him.

Hobhouse, J.—The facts of the case referred for our orders seem to be simply these:—

One Tara Doss Bhuttacharge, on the part of Messrs. Lyall and Co., silk manufacturers, complained before the Magistrate that one Bhaloo Sheik had broken his contract to work as a katoni or silk-spinner for three years in Messrs. Lyall and Co's. silk factory, and prayed that, under the provisions of Act XIII of 1859, his complaint might be enquired into and determined.

In making the complaint, Tara Doss admitted that Bhaloo Sheik owed no money for any advances, but rather that he was owed a small sum, it may be presumed, as a balance of wages due.

The Magistrate considered that no prima facie case of advances

due was made out against the person accused, and under the provisions of Section 67 Code of Criminal Procedure dismissed the complaint.

The Sessions Judge is of opinion that, inasmuch as the custom of the district in the matter of silk-spinners is for the manufacturer to make an advance of one month's pay for work to be done, there was in this case sufficient evidence of an advance made on account of work to be done to have made it necessary under the provisions of Section 1 of the Act for the Magistrate to have summoned the accused, and to have enquired into and determined the case as the law directs.

I observe that in this case there is no evidence of exactly that custom to which the Sessions Judge alludes, but the contract before us shows that Sheik Bhaloo received an advance of something more than five Rupees, and thereupon contracted to work as a silk-spinner for three seasons at Messrs. Lyall's factory, on wages of five Rupees a month; agreeing that, if he failed so to work, his property might be sold by way of recovering damages, or he himself might be punished in the Criminal Court as the law might direct, and the fact is that no advance is now due from Sheik Bhaloo, but that rather money is due to him.

These facts being so, the case appears to me to be one to which the provisions of Act XIII do not apply.

The Act is one to provide for the punishment of "fraudulent" breaches of contract by laborers, and the condition therefore which seems to me to be precedent to any enquiry under the Act is, that fraud of some kind should be disclosed.

Now, on the face of this case, there is no fraud disclosed; for if there was an advance made on account of wages for work to be done, then those wages have not only been worked off, but there is actually a balance due to the accused.

And if on the other hand the money advanced was not for wages, then it seems to me the alleged advance was not truly an advance, but was simply a premium upon a contract

The very penalties imposed under Section 2 seem to me to show that the present case does not come within the terms of the Act, for the Magistrate is either to cause the money advanced or any part of it to be repaid, or he is to direct the laborer to perform or get performed the work.

But here there is no advance due, and the case is simply that, of a laborer who refuses to continue to work for the wages agreed upon.

This may very well be a case for adjudication by a Civil tribunal; but in such a case, the Magistrate was, I think, right in declining to proceed with any Criminal enquiry under this Act, and his order must stand.

Jackson, J.—I am of opinion that this was not a complaint cognizable under Act XIII of 1859.

That'Act relates to fraudulent breaches of contract on the part of workmen and others, and I think it ought to appear that the workman refuses or neglects to perform work in respect of which he has received an advance.

When a man has contracted to work for three or ten years for another and at the time of the making of such contract, has received an advance equal to one month's wages, and afterwards works for 12 months, receiving payment on account of wages and at the end of the 12th month having a small sum due to him, after taking the advance into account, refuses to continue working, can it be said that such a man is under advance, or that his breach of contract ipso facto fraudulent?

If such a case come within the Act a man might be bound, upon an advance of one Rupee, to work for 20 years; and although the Magistrate might probably not enforce the contract, still the complaint would be cognizable, and the Magistrate would probably be bound to issue his warrant or summons and the knowledge that the Act might be applied in such a case, would have the effect in many instances of reducing the workman to something like bondage. I therefore concur with my brother Hobhouse in holding that the Joint Magistrate was right in refusing to entertain this complaint.

(See page 377.)

# BENGAL LAW REPORTS, APPELLATE CR. VOL III p. 32. . 10th July, 1869.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby. In the matter of Domestic Servants. (a.)

Act XIII of 1859—Servants—Artificer, workman, laborer, Act XIII of 1859 does not apply to contracts for a "chakri," domestic or personal service, but to contracts to serve as artificer, workman, or laborer.

Jackson, J.—We are of opinion that Act XIII of 1859 does not apply to contracts to serve as domestic servants, and that the proceedings of the Deputy Commissioner, sitting as Magistrate in two cases before us, were erroneous.

To bring any person under the operation of the Act, it must be shown that he has contracted to serve as an artificer, workman, or laborer.

This was not shown in either of the cases before us: on the contrary, the agreement produced was for "chakri," which usually means domestic or personal service, and not service of the kind referred to in the Act.

The accused, Sukura, was sentenced to rigorous imprisonment for one month. The sentence must be reversed.

The accused, Subhai, agreed to complete the remainder of his service, and a recognizance to that effect was taken from him. This recognizance must be quashed as taken without authority.

(a.) Reference from the Judicial Commissioner of Assam, under Section 434 of the Code of Criminal Procedure.

Same case, see 12 Weekly Reporter, Cr. R. p. 26.

S. L.

# 12 W. R., Cr. R., p. 3.

THE 14TH JUNE, 1869.

Present.

The Hon'ble J. P. Norman and E. Jackson, Judges.

Procedure—Evidence given in a former trial—Corroboration—Section 31 Act II of 1855.

Committed by the Magistrate and tried by the Sessions Judge of East Burdwan on a charge of dacoity.

The Queen versus Bishonath Pal.

The irregularity and injustice of using against a prisoner in a subsequent trial the deposition of witnesses given in a previous case commented on, and the proper course which should be followed in corroborating evidence under Section 31 Act II of 1855 pointed out.

Norman, J.—The prisoner has been convicted of dacoity \* by the verdict of a Jury, and sentenced to transportation for life.

There appears to have been a very serious irregularity in the mode of conducting trial.

The depositions of witnesses taken in the trial (in July 1867) of other persons charged with having been engaged in the same dacoity, are put up with the record.

The witnesses appear to have been re-sworn and each in turn says in effect—"I gave evidence before in this Court, and that evidence is true."

Without going into the details of the dacoity which must have been taken by the Judge and the Jury entirely from the former

\* Gang-robbery is substituted for this word in the Straits Penal Code. S. L.

deposition, each witness in turn merely adds a few particular facts and details, to show the connection of the prisoner with the dacoity. Even while making these statements, the witnesses refer to their former depositions, as for instance thus: "It is true that I recognized Bishonath Pal during the dacoity," &c. "It is true that I saw the prisoner Bishonath strike two or three blows at Heera Lall."

The Judge's record does not clearly show in what order the evidence was laid before the Jury, but I am led to infer that the Judge, probably in the first instance, allowed the deposition on the former trial to be read in the presence of the Jury, and then proceeded to question the witness. However that may be, the course of proceeding was most irregular.

Under Section 31 of Act II of 1855, \* the deposition containing the statements of a witness as to the commission of the dacoity taken on the trial in July 1867, would have been admissible in order to corroborate his testimony given on the trial of the prisoner Bishonath.

The evidence of the witness whose testimony it was proposed to corroborate, should have been first taken, and after such witness had finished his evidence, and not before, the former deposition might have been put in, not to add to his testimony, but simply to corroborate it by showing that the statements made by him while the facts were still fresh in his memory correspond with those made by him in the Court of Session in the present case, at the same time when each deposition was put in, the evidence of the witness not having been given in the Court of Session there was nothing in the record which made it admissible. There was nothing which was corroborated by it.

In the Attorney General of New South Wales versus Bertram, reported 36, Law Journal, Privy Council Cases, 51, on a second trial, when the witnesses were before the Jury the depositions taken on the first trial were read, and the witnesses were asked in turn whether what was read was true, and they were then submitted to fresh oral examination and cross-examination. What was done was done by the consent of the prisoner. Their Lordships say they were not in a condition to say that any injustice to the prisoner resulted from it, but they say that no one called on to review the proceedings could be certain of the contrary.

They disregarded the consent of the prisoner, and speak of the wisdom of the common understanding that a prisoner on his trial can consent to nothing. They say it is essential that no unneces-

<sup>\*</sup> This Evidence Act is in force in the Straits.

sary difficulty should be thrown in the way of the Jury's understanding, or rightly appreciating, the evidence. They point out the difficulty that a Jury must experience in sustaining their attention or collecting the value of different parts of the evidence when merely read out to them. They show that the most careful note must often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witnesses in the presence of the prisoner, Judge, and Jury is justly prized; that it cannot give the look or manner of the witness, his hesitation, his doubts, his variation of language, his confidence or precipitancy, his calmness or consideration. It cannot give the manner of the prisoner when that has been important, in the statement of any thing of particular moment, nor could the Judge properly take upon himself to supply any of those defects which indeed will not necessarily be the same on both trials. They say "It is in short, or it may be, the dead body of the evidence " without its spirit which is supplied when given openly and orally by the ear and the eve of those who receive it." Their Lordships add that they do not hesitate to express their anxious wish to discourage generally the mode of laying the evidence before the Jury which was adopted on that trial.

The observations of their Lordships apply in all their force to the present case. There are, moreover, many objections to the course of proceeding in the case now before us, which did not apply to that before the Privy Council. There the depositions read had been taken in the former trial of the prisoner himself. The prisoner had been present and had had the fullest opportunity of cross-examining the witnesses. Here the depositions read were taken in the absence of the prisoner on the trial of other persons. There the prisoner was represented by Counsel, no doubt had copies of the depositions, and not only took no objection but actually consented to their being read on the second trial. Here the prisoner appears not to have been defended. To read evidence from written depositions must place a prisoner who is defending him self, at a disadvantage. If the evidence is given slowly and taken down sentence by sentence in the usual way, the prisoner can follow each witness without difficulty. He has time to observe and reflect on each point that appears to make against him, and when his turn comes he has at least an opportunity of cross-examining or answering in his defence with reference to each of such points in detail. The disadvantage at which he will stand, if the evidence of each witness is read out without pause as a connected story, is enormous. Probably of slow apprehension at best, hav-

ing lost what little presence of mind he even possessed from the terror and confusion produced by the new and alarming position in which he finds himself, his thought necessarily diverted from the words of the reader by the noise and bustle about him, the prisoner would find himself incapable of fixing his attention closely on the several facts, the hurried recital of which gives him no time to appreciate their importance or consider their bearing in the case made against him. If he does understand their significance at the moment, his mind will not have dwelt on them long enough to enable him to fix and arrange them in his memory, so that when his time comes to defend himself, he can cross-examine or make answer in reference to them in detail in his address to the Jury. All that will be present to his mind when he comes to his defence will be a blurred and most imperfect impression of the case which he has to meet. But that is not all. The course we suppose to have been taken of reading over the deposition of a witness against the prisoner, and putting the question to him whether or not the deposition is true, is not only open to the objection that it is putting a leading question in the most objectionable of all possible forms, prompting the witness as to all the details of the story which he is expected to tell in a great degree thereby. depriving the prisoner of the means of testing the veracity or the recollection of the witness by cross-examination; but to the witness himself it is a dangerous snare. He is reminded that on a former occasion he deposed to circumstances tending to establish the prisoner's guilt, and it is impliedly intimated to him that the same story is expected from him again.

To illustrate further the injury to the prisoner that may result from this course of proceeding. Suppose on the former occasion the witness spoke positively to having recognized three or four prisoners, then under trial, amongst a body of dacoits, and also named one or two other persons not before the Court. Suppose the witness to be speaking quite honestly and to the best of his knowledge, he could not as regards such other persons speak under the same sense of responsibility as he would with respect to a prisoner under trial. He might have felt some doubt, hesitation, or uncertainty as regards the absent person which he might not have thought it necessary to express. No one would be there to cross-examine or check his statements as regards such persons. or to induce him to consider whether on reflection he really was quite as sure of their identity as he supposed and represented himself to be. If at the end of these two years the deposition is put into the hand of the witness it would at once occur to him to think that as, when the facts were quite fresh in his memory, he spoke positively to identify the person, he was no doubt then right. Doubts and hesitation would be forgotten or cast away, and he would feel sure that what he then said was correct.

In the present case the facts are few and simple, and it may be that the prisoner has sustained little or no actual injury by the course adopted at the trial.

But it would say with their Lordships of the Privy Council in the case I have cired, that the object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be.

A prisoner defending himself against a charge of an offence alleged to have been committed a long time previously, if he has any defence, must always be under a great difficulty in substantiating it by proof; and therefore in such cases it is peculiarly necessary to see that the case for the prosecution is not conducted so as further to prejudice him. It is impossible to say that the prisoner may not have been injured in his defence by the course adopted in the present case.

As the evidence has not been legally taken, this Court has not before it materials in which it can properly form a correct judgment as to the guilt or innocence of the appellants, and therefore, according to the opinion of the Full Bench upon an analogous point in Elahi Buksh's case, \* it is necessary that there should be a new trial.

This is a Jury trial in which the Court has not the power to reverse the finding of the Jury on a question of fact. The prisoner has a right to the opinion of the Jury or of this Court on evidence duly and legally taken against him. I am therefore of opinion that the conviction must be quashed and that a new trial must take place.

Jackson, J.—I concur with Mr. Justice Norman that the mode in which this trial was conducted was irregular. The evidence of witnesses given and taken down in the absence of the prisoner is no evidence against the prisoner. The irregularity alluded to is one which has been frequently animadverted upon by this Court, and upon which numerous trials have been set aside even in the time of the late Sudder Court. The conviction of the prisoner is quashed and a new trial will be held.

<sup>\* 5.</sup> W. R., Criminal Rulings, 80.

4 W. R., Cr. Letters p. 1.

No difference in Mahomedan Law between Nekai Wives and others.

No. 503.

From the Registrar of the High Court, &c., dated Calcutta, the 30th May 1865.

# (Criminal Side.)

#### Present.

The Hon'ble C. B. Trevor, G. Loch, and W. Morgan Judges.

Sir,—In reply to the question submitted by you in Tabular Statement No. 127, dated the 12th instant, vis., whether a "Nikahit Stri" is a wife within the meaning of Section 497 and 498 of the Penal Code, I am directed to inform you that marriage, under Mahomedan Law, is a civil contract, and proposal and consent are the essentials to the contract; and if the legal condition as to the age and freedom of the contracting parties are satisfied, it is a valid marriage. There is no difference in Mahomedan Law between a Nekai wife and another, and the Sections of the Penal Code above cited apply equally to both.

1 W. R., Cr. L, p, 1.

#### Withdrawals of Complaints and Compounding offences. No. 866.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge, Sylhet, dated Calcutta, the 19th September 4864,

(Criminal Side).

#### Present.

## The Hon'ble C. B Trevor, Judge.

SIR,—With reference to para. 5 of the Magistrate's letter forwarded with your communication No. 27 of the 29th nltimo, I am directed to request you will inform that officer that withdrawals of Complaints and compromises can, under Sec. 271 of the Code of Criminal Procedure, be permitted only in cases falling within the scope of Chapter XV of that Code. A party may compound an offence which consists only of an act irrespective of the intention of the offender, and for which the injured person may bring a civil action, e. g., assault, illegal confinement, adultery (Exception, Section 214 Indian Penal Code) and such like; but, if he once brings such an offence to the cognizance of the Criminal Courts, he cannot withdraw the charge.

You will be good enough to impress the above remarks on all the Magisterial officers subordinate to you, as it is quite possible some

of them may be under a similar misconception of the provisions of the law in respect of cases compromisable.

2. With reference to the reasons assigned by the Magistrate for delaying to respond to requisitions for explanation made by you, I am to request you will inform that Officer that his Collectorate duties cannot be heavier than, if so heavy as, those of other Officers. Be this, however, as it may, the Court expect he will exercise a vigilant superintendence over his subordinates, and also himself answer punctually any calls for explanation made on him either by yourself or by you acting under the orders of the High Court.

#### 2 W. R., Cr. L., p. 2.

Framing of charge under Section 211, Penal Code. Custody of recusant prosecutors.

Extract (paras 2 and 3) of Letter No. 13, from the Registrar Appellate High Court, to the Deputy Commissioner of Cachar, dated the 6th January 1865.

# (Criminal Side.)

Present.

The Hon'ble C. B. Trevor, Judge.

2. In accordance with the provisions of Section 234 of the Code of Criminal Procedure, the charge against the prisoner Jeebun Coolie (Case No. 10 of Statement 4) should have described the imputed offence as nearly as possible in the language of the Indian Penal Code.

Following the terms used in Section 211 of the Indian Penal Code under which the charge was laid, it should have set forth that the prisoner "falsely charged" and not that he "made an accusation." The Court also observe that there was a material defect in the charge owing to the omission of the words "knowing that there was no just or lawful ground for such charge" against the accused.

3. The first and second heads of the charge against the prisoner, Brojo Kishen Deb, are, the Court observe, obviously absurd. The Assistant Commissioner should rather have framed a charge, under Section 166 of the Indian Penal Code, coupled with Section 159 of the Code of Criminal Procedure, as he should have known that rules regarding the custody of accused persons do not apply to complainants Amendment of the charge, I am to add, would not have affected the result of the case.

### 2. W. R., Cr. R, p. 15.

Present.

The Hon'ble C. B. Trevor, and G. Loch, Judges.

Charge of Theft and Criminal Breach of Trust how to be framed.

Extract (para. 2.) of Letter No. 203, from the Registrar, Appellate High Court, dated 7th March 1865.

2. In the charge against Mirtoonjoy, Tin Mistry (Case No. 1 of Statement No. 4,) the first head should have been sub-divided into two heads, one charging the prisoner with theft of Mr. Bell's private property, the other with theft of property belonging to the Jullinga Tea Company of which Mr. Bell was Manager. The first head of the charge should have been framed thus:-That he. between the months of February and October last at Jullinga in Cachar, being a servant of Mr. Bell, committed theft by stealing about five hundred Rupees worth of property in the possession of his master Mr. Bell, &c., in the words given in column 9. words underlined, you will observe, are very material and have been omitted in the charge on which the prisoner was tried. actual possession is very material in a charge of Theft, as it constitutes the difference between Theft and Breach of Trust. The second head of charge should have been similar to the first, but referring to the Tea Factory instead of to Mr. Bell. In what was the second head of the charge upon which the prisoner was tried, the Court observe that the following were omitted-" he, being a servant, and being in such capacity entrusted with dominion over property worth 500 Rupees," committed a Criminal Breach of Trust with respect to "that property."

# 2 W. R., Cr. **L**., p. 15.

A charge of House Trespass cannot be compounded.

No. 181.

Resolution of the High Court of Judicature at Fort William in Bengal, under date the 20th February 1865.

Present.

The Hon'ble C. B. Trevor and the Hon'ble G. Loch Judges.

Read a letter No. 13, dated 6th February, from the Sessions Judge of Bhaugulpore, submitting, under Section 434 of the Code of Criminal Procedure, the case of Dookha Hulwai versus Nuthoo Mahoot, that the order of the Deputy Magistrate, dated 8th December 1864, permitting the withdrawal of the prosecution may be cancelled as illegal.

The Deputy Magistrate in his judgment, has acted under the erroneous impression that the offence charged (House Trespass, Section 448 of the Penal Code) consists only of an act irrespective of the intention of the offender, and, therefore is within the exception specified in Section 214 of the Penal Code.

House Trespass is defined, in Section 442 of the Penal Code, to be the commission of Criminal Trespass by entering into or remaining in any building, &c., used as a human dwelling, &c., &c., and Criminal Trespass is defined by Section 441 of the Penal Code to be the entering into or upon property in the possession of another with intent to commit an offence or to intimidate, &c., or (after the lawful entry into or upon such property) the unlawful remaining there with intent thereby to intimidate, &c., &c. It is the criminal intent which is the principal ingredient to the offences of Criminal Trespass and House Trespass. Moreover, as the compromise or withdrawal of a Criminal prosecution is permitted only by Section 271 of the Code of Criminal Procedure in cases falling under Chapter XV of that Code, and as House Trespass, which is punishable with imprisonment for one year, does not fall under that Chapter, a charge for that offence cannot be compounded.

The Court agree with the Judge as to the illegallity of the Deputy Magistrate's order dated 8th December last, and, cancelling it, direct that he proceed with the trial of the accused Nuthoo Mahoot.

The original record of the case is, returned.

# Para. 2, of Letter No. 503 omitted in page 533.

2. I am to add that the above remarks do not apply to those marriages amongst the *Sheahs* which are only temporary, and, though called marriages, are a sort of legal concubinage.

# 4 W. R., Cr. L., p. 1.

Dacoity with Grievous Hurt-Finding and Sentence in case of doubt of which of several charges the accused is guilty.

Extracts (paras. 2,3,4, and 5) of Letter No. 855, from the Registrar of the High Court, &c., dated Calcutta the 26th August 1865.

- 2. The Court are of opinion, on consideration of the question put in your first paragraph, that, when grievous hurt is inflicted with a deadly weapon by one of ten men armed with such weapons, and engaged in dacoity, all the men are liable to the minimum punishment prescribed by Section 397 of the Penal Code.
- 3. In regard to the points set forth in your second paragraph, the Court observe that the two substantive crimes under Sections

395 and 396 are dacoity, and dacoity with murder. Dacoity with wounding (as under the old laws, it would have been called,) or dacoity with grievous hurt, or attempt to cause death or grievous hurt, falls, as to its punishment, under simple dacoity, with this difference that the *minimum* punishment is seven years. Hence it is strictly necessary that, in such a case, both Sections 395 and 397 should be cited in a charge under Section 397 of the Penal Code: for the punishment is not fully given in the last Section, which is, as you observe, simply declaratory.

- 4. With respect to your third paragraph, the Court observe that, if the offence of "giving false evidence" is assigned in two statements, and you are unable to decide which is the false one,—in other words, if you are doubtful of which of the charges, the accused was guilty,—you should only find that he is guilty on some one of the charges, and record the finding and sentence in the mode laid down in paragraph 5 Section 382 of the Code of Criminal Procedure. In such a case, if the offences differ, sentence should be passed for the least aggravated offence (Section 72 of the Indian Penal Code.) In the present case you state that you have, on the evidence, no doubts. You should, therefore, convict or acquit the accused on the charge regarding which you entertain no doubts; and a plea of guilty to a particular charge if you discredit it, does not, of necessity, require a sentence against the party pleading it.
- 5. In conclusion the Court direct me to request that, for the future, in cases like those which form the subject of your present reference, you will rely on your sound judgment. You will very probably be right in your conclusions and your interpretation of the law; and if you are not so, any error can be rectified on appeal. If every District Judge were to ventilate his doubts to the Court, and require answers with a view to the solution, the performance of his duty would very seriously interfere with the other duties of the Court.

#### 

# 4 W. R., Cr. L., p. 2.

False charge of fraudulent destruction of valuable Security—Statements of Witnesses recorded by Police Officers.

Extracts (paras. 2, 3, and 5) of Letter No. 898, from the Registrar of the High Court, &c., dated Calcutta, the 6th September 1865.

2. The first head of the charge against Roop Chand Lalla (Case No. 2 of Statement No. 4,) is not complete. If the accused merely charged Baidonath Satputtee with having destroyed a va-

luable security, he did not charge that person with an offence under the Penal Code. It is, however, presumed that, with the exception of the incomplete charge in this case, your proceedings were regular; and that the accused made a false charge under Section 477 of the Penal Code. In such an offence there must be fraud, dishonesty, or an intent to cause damage or injury, and the false charge upon which this trial is founded probably contained one of these essentials.

- 3. It does not appear clearly from your judgment in the case of Kalee Mytee (Case No. 9 of Statement No. 4) that the deposition of the deceased woman, recorded by the Policeman Ahmed Bux, and received by you as evidence (Exhibit B,) was made under such circumstances as would make it a dying declaration under Section 371 of the Criminal Procedure Code. The Court presume that the necessary precautions were taken, as otherwise the deposition, being that of a witness taken by the Police, would not be receivable as evidence (Section 145 of the Code of Criminal Procedure.)
- 4. The paper termed Exhibit B in the case of Oroon Mytee (Case No. 11 of Statement No. 4) should not have formed part of the record, or have been treated by you as evidence. The provisions of the latter portion of Section 145 Criminal Procedure Code, would apply to this document which appears to have been the statement of a witness recorded by a Police Inspector while enquiring into a matter under orders of the Magistrate. The depositions of the Inspector and of some of those who were present, when the prisoner avowed the authorship of the anonymous petition, would have been sufficient to prove the avowal.

# 4 W. R., Cr. L., p.3.

Framing of charge for False Evidence—Dying depositions without proof of belief of approaching death.

Extracts (paras. 2 and 3) of Letter No. 903, from the Registrar of the High Court, &c., dated Calcutta, the 7th September 1865.

- 2. The Court remark that in the charges against Bunwares Singh (Case No. 4 of statement No. 5,) and Koylash Chunder Mitter and others (Case No. 8), the false statements under Section 193 Penal Code, upon which these charges were founded, should have been fully set forth.
- 3. With reference to your remarks on the case of Radihca Pershah Ghosain (Case No. 9 of Statement No. 5,) the Court di-

rect me to state that, if the deposition of the deceased was taken by the Deputy Magistrate in the presence of the accused, the absence of proof as to whether the deponent believed himself to be in danger of approaching death, would not make his evidence inadmissible. It could not, of course, be treated as a dying declaration, but it might be admitted as evidence under Section 369 of the Criminal Procedure Code.

### 4 W. R., Cr. L., p. 3.

Doing bodily injury with the knowledge that the act done is likely to cause death, is Murder.

Extract (para. 2.) of Letter No. 908, from the Registrar of the High Court, &c., dated Calcutta, the 8th September 1865.

2. The Court, on perusing your finding in the case of Saribut Mundul (Case No. 18 of Statement No. 4.) are wholly unable to understand on what grounds you have concurred in the verdict of the Jury. There was no legal provocation in the case, nor was there the absence of premeditation, nor was there heat of passion on a sudden quarrel which would reduce the crime to culpable homicide; but, on the other hand, the act causing the bodily injury was, according to the verdict of the Jury, done intentionally with the knowledge, on the part of the offender, that it was likely to cause death. Under these circumstances, the case appears to the Court to be one of cruel murder.

# 4 W. R., Cr. L., p. 4.

Compensation to prosecutor—Proof of pecuniary loss—Convictions under Sections 211 and 193 Penal Code.

Extracts (paras. 5 and 7) of Letter No 927, from the Registrar of the High Court, &c., dated the 11th September 1865.

5. With reference to the sentence passed by you on Gunga Gowala and another (Case No. 8 of Statement No. 4) imposing on him a fine of 25 Rupees to be paid to the prosecutor, and your remark that the amount should "be paid to the co-prosecutor for the pecuniary loss which must have resulted to him from his long sojourn in hospital," the Court observe that it was your duty to find, first, that the prosecutor had incurred pecuniary loss, and then to assess the amount of such loss before awarding compensa-

- tion. You should not have awarded compensation on the above supposition; but, as the fact would show that pecuniary loss has been suffered, and that the amount awarded is reasonable and proper, the Court see no reason to interfere with your order.
- 7. The prisoner Bheechook Dosadh (Case No. 14 of Statement No. 4.) should not have been convicted and sentenced both under Section 211 and 193 of the Indian Penal Code, since these offences were committed by him simultaneously and by the same act. As, however, the sentences in the aggregate are not excessive for a conviction under Section 193, the Court will not interfere unless they think proper to do so as a Court of Appeal.

(See p. 279.)

## 4 W. R., Cr. L., p. 4.

False Evidence-Grievious Hurt-Forgery.

Extracts (paras 3, 4, and 5) of Letter No. 929, from the Registrar of the High Court, &c., dated the 11th September 1865.

- 3. With reference to the charge of giving false evidence against Sofer Ali (Case No. 23 of Statement No. 4.) the Court observe that the statement made by the accused upon which that charge was founded, should have been expressly stated therein.
- 4. Your judgment in the case of Hyder Ali (Case No. 24 of Statement No. 4) is not sufficiently clear as to the nature of the grievous hurt inflicted. Your observation that "the injuries received by Bunnoo were severe, but not dangerous; the evidence "of Civil Surgeon, however, shows that the constituted grievous "hurt," is very vague on this most important point. The Court will however, presume, unless the contrary be shown on appeal, that your judgment was correct.
- 5. The charge against Bahsarut Ali (Case No. 25 of Statement No. 4) should have contained some description of the forged document. It was not sufficient that it should state merely that the prisoner had "committed forgery by signing Ameencollah's name on a document." It does not appear from your judgment in the case that the prisoner signed Ameencollah's name with any such intent as would make his act forgery, under Section 463 of the Penal Code. It is possible that that act might have amounted to some other offence under the Penal Code, but further action is unnecessary, since the sentence of two months' rigorous imprisonment passed by you has already been undergone. or will immediately expire.

4 W. R., Cr. L., p. 6.

Recovery of unpaid portion of fine on death of offender.
No. 968.

From the Registrar of the High Court, &c., dated Calcutta, the 19th. September 1865.

(Criminal Side.)

Present.

The Hon'ble C B. Trevor, Judge.

Sir,—In reply to your letter No. 239, dated the 7th instant, I am directed to state that the matter therein referred has been fully considered by the Court, and that though, under Section 70 of the Penal Code, after the death of an offender any property which would then be legally liable for his debts, would be liable to the payment of any portion of a fine remaining unpaid at his death, still, during his life, under Section 6 of the Code of Criminal Procedure, only moveable property belonging to the offender which may be found within the jurisdiction of the Magistrate of the District in which he has been sued and sentenced, is liable.

## Memorandum made by Police Officer.

Extract (para: 4) of Letter No. 970, from the Registrar of the High Court, &c., dated Calcutta, the 19th September 1865.

4. With reference to your 5th para: I am to observe that the Memorandum made by the Police Officer should not have been on the record of the case. It was in no sense a legal deposition, and should not have been noticed by the Court, but should have been in the Police Officer's possession, and might have been used by him to refresh his memory if you were satisfied, from the evidence of that person, that the Memorandum was what it professed to be.

# 4 W. R., Cr. L., p. 7.

Fines inflicted for offences punishable under other Laws than the Penal Code are not within the provisions of Section 70 of the Code unless specially extended thereto.

No. 1059.

From the Registrar of the High Court. &c., dated Calcutta, the 27th November 1865.

# (Criminal Side.)

Present.

The Hon'ble C. B. Trevor, G. Loch, and H. V. Bayley, Judges. Sir,—I am directed to acknowledge the receipt of your Tabular Form, in which you refer the question from the Magistrate, as to

whether a fine, imposed under "any special or local law" (referred to under S ction 21 of the Code of Criminal Procedure) is subject to the operation of Section 70 of the Penal Code, and can be levied any time within six years, notwithstanding that the prisoner has suffered the term of imprisonment to which he has been sentenced in default of payment of the fine; and, in reply, to state that the Court.consider the view taken by you to be correct.

2. The fine alluded to in Section 70 of the Penal Code is one of the punishments to which offenders are liable under the provisions of Section 53 of the Penal Code, and the offender therein alluded to as a person who has done "anything made punishable under the Penal Code" (See Section 40.) It seems clear, therefore, that Section 70 refers exclusively to cases which have been dealt with under the Code, and that fines inflicted for offences punishable under other laws are not within the provisions of that Section unless its operation be specially extended thereto.

# 4 W. R., Cr. L., p. 8. Notes made by Police Superintendent.

No. 1069.

From the Registrar of the High Court, &c., dated Calcutta, the 29th November 1865

(Criminal Side.)

Present.

The Hon'ble C. B. Trevor, Judge.

Sin,-In acknowledging the receipt of your letter No. 210, dated the 31st ultimo, I am directed to inform you that the Court, in the 7th paragraph of my letter to your address. No. 816, dated the 19th August last, only intended to point out to you that the notes made by a Police Superintendent should not be looked at by him in order to refresh his memory until they had been verified, that he might then refer to them and give evidence on the point entered in them; but the notes themselves, by being used to refresh memory, do not thereby become evidence; and neither under Section 145 of the Code of the Criminal Procedure, nor under Section 45 of Act II of 1855, should they be received and looked at by you as such, as seems to have been the case in the trial of Gopal alias Junglee, which gave rise to the Court's remark. The notes are simply allowed with a view of refreshing the memory of the person whose statement alone is evidence, and, as such, they may be seen by the accused parties' vakeel, and he may cross-examine witnesses upon them in order that his client may have the benefit of the witness refreshing his memory by every part of them.

.2. I am desired to request your attention in future to the instructions contained in the foregoing.

#### 4 W. R., Cr. L., p. 8.

How Police records to be evidence against an accused—Magistrate not bound to file any document alluded to in his grounds of commitment.

No. 1092.

From the Registrar of the High Court, &c., dated Calcutta, the 7th December 1865.

# (Criminal Side.)

The Hon'ble C. B. Trevor, G. Loch and H. V. Bayley, Judges.

Sin.—I am directed to acknowledge the receipt of your letter No. 460, dated the 21st September last, in which you request the Court's opinion as to whether the Magistrate and District Superintendent of Police are bound to send for the perusal of the Sessions Judge, such Police records as he may call for; and whether the Magistrate is or is not bound to file any document alluded to in his grounds of commitment; and, in reply to answer both these questions in the negative.

2. The Court are of opinion that the Police records are not evidence against an accused party; that you should summon the Police Officer with the daily record of his proceedings kept under Section 154 of the Code of Criminal Procedure; you should then examine him as to the matter you require to elicit, giving him an opportunity after the record has been proved to be what it is represented to be, and, if it be necessary, to refresh his memory by looking at it, and to tell the Court what it contains. The Policeman's statement will then be legal evidence, and the object of the Court will then be fully gained.

#### 4 W. R., Cr. L., p. 9.

Each head of a charge to be complete in itself.

Extract (para. 3) of Letter No. 1114, from the Registrar of the High Court, &c., dated Calcutta, the 11th December 1865.

3. The Court observe that the entire charge against Nujub Shah and others (Case 2 of Statement No. 5) is not altogether regular, for each head should have been complete in itself; whereas,

instead of attaching to each particular head the Section of the Penal Code under which the offence charged therein was punishable, the Committing Officer has wound up the charge by a general summing up of the several Sections of the Penal Code under which the offences charged in the different heads were punishable.

### 4 W. R., Cr. L., p. 10.

Framing of charge of Unlawful Assembly.

No. 1150.

From the Registrar of the High Court, &c., dated Calcutta, the 15th December 1865.

(Criminal Side.)

Present.

The Hon'ble C. B. Trevor, Judge.

SIR,—With reference to your Jail Delivery Statements for September last, I am directed to remark that the first head of the charge against Ishwar Chunder Ghose and another (Case 2 of Statement No. 4,) and the second and third heads of the charge against Azgar and another (Case 3 of Statement No. 4) are incomplete, inasmuch as they have omitted to state the common object of the unlawful assembly, in prosecution of which an off-nce was committed by a member so as to render all liable to such offence under the provision of Section 149 of the Penal Code.

# 4 W. R., Cr. L., p. 11.

Charge of dishonestly receiving stolen property to set forth knowledge or belief.

No. 1154.

From the Registrar of the High Court, &c., dated Calcutta, the 18th December 1865.

(Criminal Side.)

Present.

The Hon'ble C. B. Trevor, Judge.

SIR,—With reference to your Jail Delivery Statements for October last, I am directed to point out that the charge against Shirll (Case 2 of Statement No. 4) should have set forth that he knew or had reason to believe that the property he received was stolen property: for, without this knowledge or belief, the offence under Section 411 of the Penal Code was not complete.

4 W. R., Cr. L, p, 11.

Imprisonment for default of payment of fine—A false charge need not necessarily have been made in Court.

Extracts (paras. 4 and 5) of Letter No. 1155, from the Registrar of the High Court, &c., dated Calcutta the 18th December 1865.

- 4. In the case of Gunesh Sing (Case 6 of Statement No. 4) the Court find that the alternative sentence of imprisonment, in default of payment of fine, exceeds the legal limit which in such a case would be one and a half month, inasmuch as Section 65 of the Penal Code limits imprisonment for default to one-fourth of the maximum period fixed for the substantive offence (Section 182 Penal Code), which in this case, would be one-fourth of six months, or one and a half month. Under these circumstances the Court cancel this sentence as illegal, and direct that you will pass a fresh sentence in accordance with the law now explained to you.
- 5. With reference to the remark made in your judgment in the above case, I am to point out that there is nothing in the terms of Section 211 of the Penal Code, which support your dictum that the false charge must have been instituted in Court. The High

\*See Mayne's Penal Code, charge deliberately made before an Officer of Police, with a view to its being brought be-

fore a Magistrate, bring a party making it within the provisions of Section 211 of the Penal Code. In this ruling the Court concur, and consequently the grounds upon which you acquitted the prisoner of the charge under Section 211 are erroneous.

(a.) See Madras Report, page 519.

S. L.

# 4 W. R., Cr. L., p. 1.

Appeals remaining undecided in consequence of further enquiry and additional evidence being called for.

### CIRCULAR No. 11.

From the Registrar of the High Court, &c., to all Sessions Judges and Magistrates of Districts, dated Calcutta the 20th November 1865.

(Criminal Side.)

Present.

The Hon'ble C. B. Trevor, Judge.

The Court request that, in any explanation that may be furnished by the Courts of Criminal Appeal regarding any appeals which have remained undecided for more than one month in consequence of further enquiry and additional evidence being called for under

Section 422, Code of Criminal Procedure, there shall be stated the date on which such order was passed, so that the Court may thus be in a better position to judge of the real cause of the delay in the decision of such case.

2. The High Court take this opportunity of reminding the Lower Courts of Criminal Appeal that any proceedings involving further enquiry, or the taking of additional evidence under the law above cited, should be promptly completed in order that the course of justice may not be interrupted more than is absolutely unavoidable.

### 4 W. R., Cr. Letters p. 1.

Witnesses attending before Criminal Courts should be examined without delay.

CIRCULAR No. 12.

From the Registrar of the High Court &c., to all Magistrates, dated Calcutta, the 27th November 1865.

(Criminal Side.)

The Hon'ble C. B. Trevor, Judge.

The Court, having recently found from an explanation furnished by a Magistrate that witnesses are not invariably examined and discharged on their attendance before Criminal Courts, but are sometimes temporarily discharged without any examination, being bound over to appear again on another day, think it their duty to notify to all Magistrates their severe condemnation of such irregular proceedings.

- 2. The evidence of witnesses should invariably be recorded as soon as possible after their attendance. If, from unavoidable causes, an adjournment is indispensable, there should be no unnecessary delay. Witnesses remaining over from one day should, as a rule, be examined at the first sitting of the Court on the following day. By this means the public will be put to no inconvenience, and justice will be administered in a prompt and satisfactory manner.
- 3. The practice which the High Court have found to exist in the Court of one Magistrate is not, it is believed, prevalent, but if, contrary to the Court's expectations, it should exist anywhere, it must be forthwith discontinued, inasmuch as it is not only contrary to the spirit of the Criminal Procedure, but is calculated only to deceive the superior authorities by placing before them fictitious returns of the punctual and regular examination and discharge of witnesses.

4. The Court expect that the Chief Magistrates of districts will carefully supervise the returns of their subordinates, as the Court hold them responsible for the correction of such irregularities as have now been discovered.

#### 8 W. R., Cr. L., p. 4.

Form of charge in a case of secret burial of infant child.

Extract (para. 3) Letter No. 672, from the Registrar of the High Court to the Sessions Judge of Sarun, dated the 8th June 1867.

3. The charge against Moone Sree (Case 3 Statement 4) is not stated in exact accordance with

The she—on or about—at—by secretly burying the dead body of her infant child intentionally concealed the birth of such child and that she has thereby committed an offence punishable &c.

not stated in exact accordance with the terms of Section 318 of the Penal Code. It should have been drawn up somewhat in the manner marginally shewn. The Court re-

mark that the concealment, or attempt at concealment, by means of burial or otherwise, constitutes the offence.

#### 8 W. R., Cr. L. p. 9.

Second Marriage during life-time of first husband.

Extract (para. 3) of Letter No. 747, from the Registrar of the High Court, to the Sessions Judge of Cattack dated the 24th June 1867.

3, The Court observe that the first head of the amended charge against Mussamut Munnee (Case 4 Statement 4) has been incorrectly drawn up. The charge is that "she, on or about at—having a husband living married again—in a case in which the marriage was void by reason of its taking place during the life-time of such husband." I am to remark that it does not follow that every second marriage is void in this country, because it is contracted during the life-time of the first husband, and that no insertion, therefore, of the words underlined is very material.

# 8 W. R., Cr. L., p. 22.

Evidence of a child under Section 14 of Act 2 of 1855.

Extract (para. 2) from Letter No. 1136, dated 21st September 1867, from the Registrar of the High Court, to the Sessions Judge of Tipperah.

2. With advertence to your charge to the Jury in the case of Mussamut Shubratee (Case 1, Statement) I am to observe that the child Biste, in this instance, was either competent, within the

meaning of Section 14 Act 2 of 1855 in the manner described in Section 15, to give evidence, or incompetent. If she was incompetent, she should not have been examined at all. If competent, then her evidence was good for whatever it was worth, not simply as corroborative, but as direct evidence.

#### 8 W. R., Cr. L., p. 11.

Framing of charge in a case of kidnapping.

Extract (para, 4) of Letter No 776, from the Registrar of the High Court, to the Sessions Judge of Nuddea, dated the 28th June 1867.

.4. The Court observe that the charge against Shakhadu Koomarnee and others (Case 5 Statement 8) was not stated with sufficient fulness, and as to the abettors was, on the face of it, insufficient. The following would have been a suitable form of charge:—

That she, on or about the age of 16 years, from the lawful guardianship of her father, and thereby, &c.

The offence of kidnapping from lawful guardianship, as defined in Section 361 of the Indian Penal Code, can be committed only in respect of either a mnior or a person of unsound mind. To kidnap a person therefore, would not be the offence in question. The act of forcibly compelling or deceitfully inducing a person to go from any place is called "abduction" (Section 362 of the Penal Code); but any person may be kidnapped from British India, (Section 360). You are requested to call the Magistrate's attention to the exact words of the law.

# 8 W. R., Cr. L., p. 17.

Form of charges in cases of Grievous Hurt and Rioting with deadly weapons by a Member of an unlawful assembly.

Letter No. 887, from the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Tirhoot, dated the 31st July 1867.

#### Present.

# The Hon'ble C. P. Hobhouse, Judge.

Sir.—With reference to your Jail Delivery Statements for June last, I am directed to observe that the charges against Seeta Ram and others (Case 2 Statement 4) and Degumber Rai (Case 2 Statement 5) have been incorrectly drawn up. They should have set forth.—

"1st.—That he, on or about the—at—, was a member of an unlawful assembly, and did, in the prosecution of a common

object, voluntarily cause grievious hurt otherwise than on grave or sudden provocation to——, and that he has thereby committed an offence punishable under Section 149 read with Section 325 of the Indian Penal Code, and within the cognizance of the Court of Sessions.

2ndly.—That he, on or about the—, at—, was a member of an unlawful assembly, and did, in prosecution of a common object of such assembly, commit the offence of rioting, armed with a deadly weapon, or with something which used as a weapon of offence was likely to cause death, to wit, a—, and has thereby committed an offence punishable," &c.

8 W. R., Cr. L., p. 18.

Forms of charges in case of False Personation, and Abet-ment thereof.

Extract (para. 2) from Letter No. 908, dated 2nd August 1867, from the Registrar of the High Court, to the Sessions Judge of Backergunge.

The charges against Ram Chunder Doss and Prosono Coomar Gangooly have been incorrectly drawn up. They should have set forth. Against Ram Chunder Doss. "Firstly,—that he, on or about the——at——falsely personated one Gooroochurn Dutt, and in such assumed character made a statement, vis., (here the statement should be set forth) in a proceeding under Act 20 of 1866, and that he has hereby," &c. In the Second head, the words "on oath was not recorded" should have been omitted.

Against Prosono Coomar Gangooly. "Firstly,—that he, on the said date, at the said place, abetted Ram Chunder Doss, in falsely personating one Gooroochurn Dutt, a witness, and in making in such assumed character a statement testifying to the identity of Jumaldy, Opaguddy, Nyzuddy, and Arman in a proceeding under Act 20 of 1866, and that he has thereby committed an offence punishable under Section 94 read with Section 93 of Act 20 of 1866, and within the cognizance of the Court of Sessions. "Secondly,—that he, on the said date, and at the said place, aberted Ram Chunder Doss, in intentionally making a false statement, by stating before the Sub-Registrar of Midnapore, who was acting in execution of Act 20 of 1866, in a proceeding under the said Act, that he is Gooroochurn Dutt and a witness to the instrument A. and by testifying to the identity of Jumaldy, Opaguddy, Nyzuddy. and Arman, and that he has thereby committed an offence punishable under Section 91 of Act 20 of 1866, and within the cognizance of the Court of Sessions."

#### 4 W. R., Cr. L., p. 3.

Reference to Section 75 Penal Code-Previous convictions.

Extract (para. 3) of Letter No. 912, from the Registrar of the High Court, &c., dated Calcutta, the 8th September 1865.

Alluding to the sentence passed by you upon Joyram Aheer (Case No. 3 of Statement No. 4,) the Court observe that, as there was no enhancement of punishment beyond that to which the prisoner was liable under Section 457 of the Penal Code, you should not have referred to Section 75; you were quite right, in passing sentence, to take into consideration the prisoner's previous conviction.

#### CHARGES UNDER THE PENAL CODE.

**CXX** 

From Mayne's Penal Code, 9th Edition, p. 439 to 456. .

(No. 1.) Abettor of Murder where the Principal is also charged. That he the said C D, on or about the day of at abetted the commission of the said murder by the said A B which was committed in consequence of the abetment, and that he has thereby committed an offence punishable under ss. 109 and 302 of the Indian Penal Code, and within the cognizance of the (Style of the Court)

Upon conviction of an abettor his punishment depends upon the penalty attaching to the principal offence charged, and also upon whether the offence was or was not committed in consequence of the abetment, or a different offence was committed. Therefore, both the principal Section must be mentioned, and the particular Section of Chapter V. under which the case falls (ss. 109-113, 115-117,) with the circumstances which bring it under that Section. (1 WR. CL. 9; 2 Ibid. 1, 8.)

# (No. 2.) Abetting as a separate offence.

That one C D (or certain person unknown) on the day of committed theft by dishonestly taking Rs. 50, the property of one—out of his possession, without his consent, and that he the said A B abetted the said C D (or the said persons) in the commission of the said theft, which was committed in consequence of the said abetment, and that he has thereby committed an offence punishable under ss. 109 and 379 of &c.

(No 3.) Abetting an offence with a different knowledge from that possessed by the persons abetted.

That he, on or about the day of did insigate and abet one A B to assault one C D, he the said (abettor) then and there well knowing that the death of C D would be the probable result of such assault and intending to procure the death of the said C D by means of the assault so abetted, and that the said A B did, in consequence of such abetment, assault the said C D, who died in consequence of such assault, and that he the said (abettor) has thereby committed an offence punishable under ss. 110 and 302 of &c.

# (No. 4.) Abetting one offence where a different offence is committed.

That he, on or about the day of did in-tigate and abet one A B to break by night into the house of one C D, having made preparations for causing hurt to a person, and that the said A B did, in pursuauce of such abetment, break into the house of the said C D, and murdered one E F, then being in the said house, such murder being a probable consequence of the said abetment and being committed under the influence of the instigation aforesaid, and that he the said (abettor) has thereby committed an offence punishable under ss. 111 and 302 of &c.

(No. 5.) Abetting an offence which is not committed. That he, on or about the day of did instigate and abet one CD, then being a Village Moonsiff in to take a gratification other than his legal remuneration as a reward for showing favor to him the said (abettor) in the exercise of his official functions, that is to say, in O. S. 1 of 1861 then pending before him the said CD, and that he has thereby committed an offence punishable under ss 116 and 161 of &c.

(No. 6.) Public Servant for concealing a design to commit an offence which it was his duty to prevent.

That, on or about the day of AB, and certain other persons unknown, committed daccity (gang-robbery) in the village of —and that the said (defendant) being then and there a Police Peon and, as such, a public servant, whose duty it was to prevent the said crime, being well aware of the design to commit the said offence and intending to facilitate the commission thereof, did voluntarily conceal the same and did illegally omit to inform his superior officer of such design, and that he has thereby committed an offence punishable under ss. 119 and 391 of &c.

Note,—The indictment ought to state such facts as will show not only that the defendant was a public servant, but, also, that he was a public servant whose duty it was as such, not merely as an ordinary citizen, to prevent the offence.

(No 7.) Waging War. - See page 474 for this charge.

(No. 8.) Attempting to over-awe a Councillor by violence.

That he, on or about the day of at with the intention of inducing the Honorable A B, a Member of the Council of the Governor of , to refrain from exercising his lawful power as such member, assaulted such member, and that he has thereby committed an offence punishable under s. 124 of &c.

(No. 9.) Attempting to seduce a Soldier from his Allegiance.

That he, on or about the day of attempted to seduce from his allegiance to the Queen one then being a private soldier in the Regiment of Her Majesty's Army, and that he has thereby committed an offence punishable under s. 131 of &c.

(No. 10.) Joining an unlawful Assembly Armed with a Deadly Weapon.

That he, on or about the day of at with other persons to the number of five or more, did unlawfully assemble together, he the said being then and there armed with a deadly weapon, that is to say a gun, and that he has thereby committed an offence punishable under s. 144 of &c.

Note.—If the circumstance of aggravation does not exist, omit the clause in italies, and charge the offence as punishable under s. 143. See the remarks upon the indictment for dacoity (gang-robbery) under s. 391.

For Unlawful Assembly &c. See p. 514, 544 & 548. S.L.

(No. 11.) Rioting.

That he, on or about the day of at with other persons to the number of five or more, unlawfully assembled together at and there used force in prosecution of the common object of such assembly, viz., in resisting the lawful arrest of A. B, and thereby committed the offence of rioting, and that he has thereby committed an offence punishable under s. 147 of &c.

See pages 490, 514, 548 & 504. S.L.

(No. 12.) Affray.

That on or about the day of they the said A B and C D did commit an affray in the public street at by fighting therein, and disturbing the public peace, and that they have thereby committed an offence punishable under s. 160 of &c.

(No. 13.) Public Servant accepting a Gratification.

That he being a Public Servant, that is to say, an Inspecting Engineer in the Department of Public Works, accepted for himself from one A B a gratification, other than a legal remuneration, as a motive for his the said (defendant's) procuring a certain contract for the said A B, such being an official act, and that he has thereby committed an offence punishable under s. 161 of &c.

See page 493. S.L.

(No. 14.) Disobeying a Summons &c. s. 174.

That on or about the day of one AB, then being a Magistrate legally competent to issue a summons, did by his summons call upon the said (defendant) to appear and answer to his charge (or give his evidence) at the Police Court of on and such summons was duly served upon the said (defendant) who was legally bound to attend in obedience to the same, yet he intentionally omitted to attend at the said Police Court, and that he has thereby committed an offence punishable under s. 174 of &c.

(No. 15.) Disobeying an order promulgated by a Public Servant. That on the day of AB, then being Magistrate of made and promulgated an order directing the Left Hand Caste to refrain from conducting a processing through the Street in the Village of , such being an order which he was lawfully empowered to promulgate, and the said (defendants), well knowing the said order, disobeyed the directions of the said AB and conducted the procession through the said street, whereby a riot was caused in the said village (or) whereby danger to human life and safety was caused, and that they have thereby committed an offence punishable under s. 188 of &c.

If no riot resulted and no danger was caused by the act of disobedience the clauses in italics should be omitted, but some averment must be inserted to show that the consequences stated in the previous clause of s. 188 have resulted from the disobedience, otherwise no offence at all has been shown.

Further see p. 512. S.L.

# (No. 16.) False Evidence.

That he, on the 1st day of May, 1861, being summoned as a witness at the hearing in O. S. 1 of 1861, being a judicial proceeding then pending before the Magistrale of and being bound by solemn affirmation to state the truth, intentionally gave false evidence by knowingly and falsely stating that he had seen one Ramasawmy sign a certain document marked A, whereas he had not seen the said Ramasawmy sign the said document, and that he has thereby committed an offence punishable under s. 193 of &c.

Note.—The averment that he "intentionally gave false evidence" is a very material point. (2 W. R. C. L. 11.)

The date of the trial and the Court or officer before whom, the false statement was made should be set ont according to the facts, so that the prisoner may be able afterwards to plead his conviction or acquittal. (7 B. L. R. Appx. 66.)

Further see pages 502, 538 & 540. S.L.

W- 17 \ Tales Statement ib as Trees. The D.

(No. 17.) False Statement in an Income Tax Return.

That he, on the day of being bound by law to make a declaration as to the amount of his profits for the year 1860, which

declaration the Special Commissioner of Income Tax was authorized to receive as evidence of the amount of such profits, made a return to A B, then being Special Commissioner of Income Tax for the Town of \_\_\_\_, and in such return knowingly and falsely stated that his profits for the year 1860 had been only Rupees 1,000, whereas his profits for the said year had been Rupees 10,000, the said false statement being upon a point material to the object for which the said declaration was made, and that he has thereby committed an offence punishable under ss. 199 and 193 of &c.

Note.—The practice in the High Court of Madras is to set out the substance and as nearly as possible the words of the statement upon which perjury is assigned. Where the charge did not distinctly set forth the statement which was alleged, but it appeared that the prisoners perfectly understood on their trial what was the alleged false statement and had not been prejucied in their defence by the defective form of the charge, the Court refused to interfere. (4 R. J. & P. 359.) But the High Court of Bengal has directed that in all committals for giving false evidence under ss. 193 to 195, the particular statements on which perjury is assigned should be invariably inserted in the charge.

(1 R. C. C. Cir. 15, 16.) And that part of the statement which is alleged to be false must be specifically pointed out. (5 R. C. C. CR. 33; 7 B. L. R. Appx. 66.) The statement proved must, also, be substantially the same as that set out, unless the record is amended to meet the variance. (Arch, 713.) It must also be expressly alleged that the statement was known and believed to be false, or that it was not believed to be true.

Where several persons give false evidence, although they give it in the same proceeding and in the very same words, the offence of each is a distinct offence and of course they cannot be charged jointly in the same Count. (7 B. L. R. Appx. 66.) Where the statement of each is part of the same transaction, so that each offence will be proved and rebutted by the same evidence, it is a common and convenient course to indict all the prisoners in the same indictment, charging each, of course, in a separate count. The Madras High Court has laid it down, however, that this course is open to abuse, as it is doubtful whether prisoners so tried together will understand that they are entitled to call one another as witnesses in their defence. The Judges, therefore, directed that the strictly legal course should, for the future, be followed. Each act of giving false evidence being a separate offence, a separate charge must necessarily be framed against each prisoner, and in future, a separate trial must be held of each charge. (3 Mad. H. C. Appx. 32; 5 Bomb. C C. 55.)

# (No. 18.) Fabricating False Evidence, and using the same knowingly.

That he fabricated false evidence by making in an account book a false entry, purporting to be an entry of a payment of Rs. 1,000 by one A B to one Veerasawmy, intending that such false entry should appear in evidence in a judicial proceeding, and that such false entry, so appearing in evidence, should cause any person, who in such proceeding might have to form an opiulon upon the

evidence, to entertain an erroneous opinion touching the fact of such payment, the same being a point material to the result of such proceeding, and that he has thereby committed an offence punishable under s. 193 of &c.

That he, the said A B in O S. 1 of 1861, being a judicial proceeding before the Civil Judge of corruptly used the entry in the last count mentioned as geniune evidence, knowing the same to be fabricated and that he has thereby committed an offence punishable under s. 196 and s. 193 of &c.

(No. 19.) Causing Disappearance of Evidence.

That he, having reason to believe that an offence, that is to say murder, had been committed, did throw a certain dead body into a well, and thereby cause evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment and that he has thereby committed an offence punishable under s. 201 of &c.

Note.—Where a prisoner is charged under this Section, or under ss. 202, or 203, it is not necessary to show that any offence had been committed, provided he committed the act under the mistaken belief that an offence had been committed. (2 W R, C L. 1.)

(No. 20.) False Personation in a Suit.

That he, on the day of falsely personated one A B in a judicial proceeding before C D, Esq., the Registrar of the High Court of Madras, and in such assumed character became security for one X, a receiver appointed by the said Court, the same being an act done in a civil suit then pending in the said High Court, and that he has thereby committed an offence punishable under s. 205 of &c.

(No. 21.) Fraudulent Transfer of property.

That one A B was a creditor of the said (defendant) and had sued him in the Moonsiff's Court of in O. S. 1 of 1861, and had obtained judgment against him for the sum of Rupees 1,000, and the said (defendant) intending to prevent a certain piece of land situated in the village of from being taken in execution of the said decree, fraudulently transferred the same to one C D, and that he has thereby committed an offence punishable under s. 206 of &c.

(No. 22.) False Claim.

That he, on or about the day of commenced a suit in the District Moonsiff's Court of against one AB, and in the said suit falsely claimed to be the owner of certain jewels then in the possession of the said AB, with intent to injure the said

A B, whereas he well knew that he was not the owner of the jewels so claimed, and that he has thereby committed an offence punishable under s. 209 of &c.

### (No. 23.) False Charge of an Offence.

That he, on or about the day of with intent to cause injury to one A B. appeared before the Magistrate of and there falsely charged the said A B with having stolen Rs. 50, he the said (defendant) at the time well knowing that the said A B had not stolen the said money, and that there was no just or lawful ground for such charge and that he has thereby committed an offence punishable under s. 211 of &c.

See pages 519, 497, 499, 534, and 545 where this form and subject, are laid down. S.L.

#### (No. 24.) Harbouring an Offender.

That on or about the day of the crime of dacoity was committed in the village of and that he the said (defendant) harboured one AB, whom he, at the time he harboured him, knew (or had reason to believe) to be one of the offenders, with the intention of screening him from legal punishment, and that he has thereby committed an offence punishable under s. 212 of &c.

# (No. 25.) Omitting to apprehend, or permitting an Escape.

That he, being a public servant, that is to say, an Inspector of Police (keeper of the Jail of) and being as such public servant legally bound to apprehend (keep in confinement) one AB who then was charged with the offence of robbery, intentionally omitted to apprehend the said AB (suffered the said AB who was then in confinement in the said Jail to escape from such confinement), and that he has thereby committed an offence punishable under s. 221 of &c.

Note.—The nature of the office held by the prisoner should be stated, so that it may appear whether the legal obligation to apprehend, or to keep in confinement, attached to it. (I. R. C. C. Cir, 19.) The names of the persons suffered to escape should be stated (Ibid); but this is not an essential to the charge, but merely a matter of particularity for the information of the accused. The nature of the charge against the person who escaped should also be stated in charges under this Section and under ss. 222 and 225, since the punishment of the public servant depends upon the extent to which justice was likely to be defeated by his breach of duty.

# (No. 26.) Counterfeiting Coin.

That he, on or about the day of counterfeited a piece of the Queen's Coin known as a Company's Rupee and that he has thereby committed an offence punishable under s. 232 of &c.

(No. 27) Passing off and possessing Counterfeit Coin.

First;—That he, on or about the day of having a counterfeit Coin, which was a counterfeit of a piece of the Queen's Coin known as a Company's Rupee, and which, at the time when he became possessed of it, he knew to be a counterfeit of the Queen's Coin, frandulently delivered the same to one A. B, and that he has thereby committed an offence punishable under s. 240 of &c.

- (No. 28.) Secondly;—That he, on or about the day of delivered to one A B as geniune a counterfeit Coin, that is to say, a counterfeit Rupee, knowing the same to be counterfeit, and that he has thereby committed an offence punishable under s. 241 of &c.
- (No. 29.) Thirdly;—That he, on or about the day of was fraudulently in possession of counterfeit Coin, that is to say, three counterfeit Anna pieces, he, at the time when he became possessed thereof, having well known that they were counterfeit, and that he has thereby committed an offence punishable under s. 242. of &c.

In charges under s. 241, the name of the person to whom it was delivered should be stated. It is also essential that the element of *fraud* should be recognized, either by the use of the word "fraudulently" in the charge, or of the terms "as genuine" in the manner indicated in the sample form. (1 R. C. C. Cir. 20.)

# (No. 30.) Murder.

That he, the said A B, on or about the day of at did commit culpable homicide amounting to murder, (1 WR. CL. 12.) by causing the death of one Z by doing an act with the intention of causing the death of a human being,

- (or) by doing an act with the intention of causing such bodily injury to the said Z, as he, the said A B, knew to be likely to cause the death of the said Z.
- (or) by doing an act with the intention of causing bodily injury to some person and that the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death,
- (or) by doing an act, knowing it to be so immediately dangerous that it must in all probability cause the death of a human being, or such bodily injury as was likely to cause the death of a human being, and committing such act without any excuse for incurring the risk of causing death or such injury as aforesaid, and that he has thereby committed an offence punishable under s. 302 of &c.

Note.—The above form is sufficient without setting forth the manner in which, or the means by which, the death was caused. Only one of the clauses commencing with (or) should be used in the same count, but if there is any doubt as to the character of the act, it is well to use different counts, stating the nature of the act differently in each. The same commencement and conclusion will be required in each count.

It is not necessary to negative the special exceptions contained in s. 300.

That he (or they) the said A B on or about the day of at committed murder by causing the death of C D, and that he (or they) has (or have) thereby committed an offence punishable under s. 302 of &c. (1 R. C. C. Cir. 26; CR. 33.)

(No. 31.) Culpable Homicide.

That he, on or about the day at committed culpable homicide not amounting to murder by causing the death of by doing an act with the intention of causing death, (or) with the intention of causing such bodily injury as was likely to cause death, (or) with the knowledge that he was likely by such acts to cause death and that he has thereby committed an offence punishable under s. 304 of &c.

Note.—The indictment should "state whether the act constituting the offence of culpable homicide, not amounting to murder was done with the intention of causing death, or only with the knowledge that it was likely to cause death, as distinct penalties are provided by law for the same acts as above distinguished." (2 WR. C. L. 8.) The words "not amounting to murder," should, also, be used. (1 Ibid. 12.)

(No. 32.) Causing Miscarriage.

That he, on or about the day of voluntarily and without the consent of A B, then being a woman with child, caused the said A B to miscarry, such miscarriage not being caused in good faith for the purpose of saving the life of the said woman, and that he has thereby committed an offence punishable under s. 313 of &c.

(No. 33.) Grievous Hurt by dangerous weapon.

That he, on or about the day of voluntarily caused grievous hurt to one A. B. by means of an instrument for shooting, that is to say a pistol, and that he has thereby committed an offence punishable under s. 326 of &c.

See pages 540 and 548. S.L.

(No. 34.) Grievous Hurt by Negligence.

That he, on or about the day of caused grievous hurt, to one A. B. by doing an act, that is to say, by driving a carriage so rashly (or negligently) as to endanger the personal safety of others, and that he has thereby committed an offence punishable under s. 338 of &c.

(No. 35.) Wrongful Confinement for the purpose of compelling restoration of property.

That he, on or about the day of wrongfully confined one A B, for the purpose of constraining the said A B to cause the restoration of certain jewels, before then stoten from him the said (defendant), and that he has thereby committed an offence punishable under s. 348 of &c.

NOTE.—The mane of the person wrongfully confined should be given. (1 R. C. C. Cir. 20.) (Further particulars see pages 476, & 510. S.L.)

#### (No. 36.) Assault.

That he, on or about the day of assaulted one A B, the said assault not being committed on grave and sudden provocation given by the said A B, and that he has thereby committed an offence punishable under s. 352 of &c.

(No. 37.) Kidnapping from lawful Guardianship, s. 363.—For charge and particulars see pages 548, 480, 481, & 497. S.L.

### (No 38.) Abduction of a Woman.

That he, on or about the day of abducted a certain woman named A B, by inducing her by deceitful means to go from her home, knowing it to be likely that she would be seduced to illicit intercourse, and that he has thereby committed an offence punishable under s. 366 of &c.

Note.—The particular portions of the Section which fit the particular case must be selected in framing the charge (2 W R. C. L. 7.) (See p. 548. S.L.)

## (No. 39.) Rape.

That he, on or about the day of committed rape upon the person of one A B, and that he has thereby committed an offence punishable under s. 376 of &c.

## (No. 40.) Theft by a Servant.

That he, on or about day of being the servant of one A B, did commit theft in respect of certain property then in the possession of hissaid master (2 WR. C.L. 8.), by dishonestly taking six spoons out of the possession of the said A B without his consent, and that he has thereby, committed an offence punishable under s. 381 of &c.

Where a completed theft is charged the goods ought to be stated. Otherwise where only an attempt to steal is alleged. (Reg. v. Gallagher, 34 L. J. M. C. 24; L. & C. 489.)

The definition of theft under the Penal Code does not render it necessary to state who was the owner of the property. Where, however, the person in possession from whom they were stolen was the owner it is usual to state that they were his property, and this allegation will be supported if it appear that

he had only some special property in them as a bailee, a pawnee, a carrier, agent, or the like. Where the person who has such special property has an absolute right to detain them from the ultimate owner for a definite time, the ownership must be laid in him and not in the ultimate owner. Otherwise it may be laid at pleasure in either. (2 Russell, 288.) A variance between the statement as to the ownership and the evidence would in general be amended, But such an amendment would be refused where it would tend to prejudice the prisoner in his defence upon the merits. Where the accused was charged with receiving goods from the prosecutor's wife, the prosecutor being alleged to be the owner, an amendment laying the property jointly in the prosecutor and his mother was refused. The prisoner's counsel stated that he had been instructed to put forward the defence that the prisoner had received the property innocently from the wife, and that as she could not be convicted of stealing from her husband he could not be convicted of receiving the property as stolen property from her. (6 Bomb. C. C. 76.).

If the facts proved under this charge amount to criminal misappropriation

or breach of trust there may still be a conviction.

### (No. 41.) Theft in a Dwelling House.

That he on or about the day of committed theft in a building used by one C D as a human dwelling (or for the custody of property) by dishoneatly taking one brass vessel, the property of the said C D, out of the said building without his consent, and that he has thereby committed an offence punishable under s. 380 of &c.

For particulars see pages 535, 503, 474 and 539. S.L.

## (No. 42.) Extortion by putting in fear of Death.

That he, on or about the day of did extort a promissory note for Rupees 100 from A B, having, in order to the committing of such extortion, put the said A B, in fear of death, and that he has thereby committed an offence punishable under s. 386 of &c.

## (No. 43.) Highway Robbery by Night.

That he, on or about the day of on the highway leading from A to B, and between sunset and sunrise, robbed one C D of a watch and seals and that he has thereby committed an offence punishable under s. 392 of &c.

Note.—The averment that the offence was committed on the highway is material. (1 WR. CL. 11.)

### (No. 44.) Dacoity \* with Murder.

That on or about the day of he, with others to the number of five or more, committed robbery, and thereby dacoity, at

<sup>\*</sup> Gang-robbery is substituted for this word in the Straits Penal Code. S.L.

the village of and that in committing such descrity one of the said persons murdered one A B, and that he the said (defendant) has thereby committed an offence number by the said (defendant) has thereby committed an offence number by the said (defendant) has thereby committed an offence number by the said (defendant) has the said (defendant).

Note.—The words in italics are said by the Bengal High Court to be redundant as being included in the term dacoity. (2 WR. CL. 1.) But the Madras High Court has ruled that they should be inserted, as being necessary to inform the prisoner of the charge against him. (Madras Rulings, 1864, on s. 395.)

Where the charge is preferred under s. 397 or s. 398, the charge must mention s. 395 as well, since the former Sections merely impose a minimum punishment, while the extent of the penalty is to be found in s. 395. (5 R. J. & P. 137.)

### (No. 45.) Criminal Misappropriation.

That he, on or about the day of dishonestly misappropriated certain jewels, knowing that such property was in the possession of one Ramasawmy, now deceased, at the time of his death, and that the same had not since been in the possession of any person legally entitled to such possession and that he has thereby committed an offence punishable under s. 404 of &c.

Note-If the offence really committed should amount to a theft the conviction will still be valid.

### (No. 46.) Criminal Breach of Trust.

That he being the clerk of John Brown, and being in such capacity entrusted with a promissory note, the property of the said John Brown, committed criminal beach of trust, by dishonestly converting the said note to his own use, and that he has thereby committed an offence punishable under s. 408 of &c.

Where the defendant is a servant of a partnership, or of a Joint Stock Company not incorporated, (Reg. v. Frankland, 32 LJ. MC. 69; 1 L. & C. 276,) the correct mode of framing the charge is to state that he is the servant of one of the partners or shareholders by name, and of others, not naming them.

If the alleged breach of trust should turn out to be a theft, the defendant may still be convicted under this charge. (See p. 535. S.L.)

## (No. 47.) Receiving stolen Property.

That he, on or about the day of dishonestly received a gold bracelet, then being stolen property, knowing (or having reason to believe) the same to be stolen property, and that he has thereby committed an offence punishable under s. 411 of &c.

The Bombay High Court have laid it down that a charge under this Section should allege that the article found in the prisoner's possession was property stolen from A B (naming him) the owner thereof. (1 Bomb. H. C. 96.) But this specification might often be impossible, and I cannot see that it is ever necessary.

(See p. 544. S.L.)

### (No. 48) Cheating.

That be, on or about the day of cheated one Veerasawmy, by falsely pretending that a certain ornament was made of gold, and thereby deceived the said Veerasawmy, and fraudulently induced him to pay the sum of Rupees 100, the property of the said Veerasawmy, as the price of the said ornament, whereas the said ornament was not of gold, in consequence of which the said Veerasawmy suffered damage in his property; and that he has thereby committed an offence punishable under s. 420 of &c.

Note.—A mere allegation in the words of the Code, that A cheated B would be too vague to give any information of value to the prisoner or the judge.

According to the practice of the High Court of Madras it is also necessary to negative the pretences by special averment (Arch. 407), but out of those limits such precision would probably not be required.

The indictment should state whose the property is, so as to negative the possibility of its being the property of the prisoner. But the omission of such a statement would be immaterial, unless the prisoner was in fact mislaid by it. In Reg v. Willans, the High Court seemed to lay down, though with considerable reluctance, on the authority of English cases, that if the property was in fact, not that of the prosecutor, as, for instance, if A by cheating B, induced him to deliver up the property of C, the offence under s. 415 would not be committed. Even supposing this view of the law to be correct, I have no doubt that any legal possession, which entitled the party cheated to retain the article as against the party cheating him, would be held to be sufficient proof of property to support an indictment.

An indictment for cheating the prosecutor of his property is proved by evidence that the article was, in fact, delivered by the prosecutor's wife, upon a permission granted by the prosecutor under the influence of the false statement. (Reg. v. Moseley, 31 LJ. MC. 24; L. & C. 92.)

See pages 478, 483 for further particulars. S.L.

## (No. 49.) Mischief to Cattle.

That he, on or about the day of committed mischief, by maining a horse (or a dog of the value of fifty Rupees) the property of A B, and that he has thereby committed an offence punishable under s. 429 of &c.

Note. F-Under this Section value may be the essence of the offence, and would have to be alleged and proved.

A calf does not come within the terms "bull, cow, or ox," and, therefore, if not worth Rs. 50, its destruction must be dealt with under ss. 426 or 428, according to its value. (Reg. v. Cholay, per Scotland, C J., 4th Madras Sessions, 1864.)

A prisoner charged with the theft and killing of two sheep under the value of Rs. 10 can only be dealt with under Section 426. (Rulgs. Mad. Sudder or High Ct., 9th May, 1853.)

See page 507. S.L.

(No. 50.) Lurking House-trespass by Night.

That he, on or about the day of at committed lurking house-trespass by night in the house of and that he has thereby committed an offence punishable under s. 456 of &c.

(No. 51.) House-breaking by night with intent to commit Theft.

That he, on or about the day of broke into the house of one A B, after sunset and before sunrise, in order to commit theft, (or in order to the committing of an offence punishable with imprisonment, that is to say the offence of adultery,) and that he has thereby committed an offence punishable under s. 457 of &c.

Note. -- If theft has been committed, add a count under s. 380. Form 41.

(No. 52) Breaking open a closed Receptacle entrusted to him.

That he being entrusted with a closed receptacle, that is to say a box containing property, (or which he believed to contain property,) did, on or about the day of dishonestly break open the same, not having authority so to do, and that he has thereby committed an offence punishable under s. 462 of &c.

(No. 53.) Forging a Bill of Exchange and fraudulently using the same, S. 467, and ss. 471 and 467.

First.—That he, on or about the day of committed forgery, by making a certain false Bill of Exchange, purporting to be a valuable security, with intent to defraud, and that he has thereby committed an offence punishable under s. 467 of &c.

Secondly.—That he, on or about the day of fraudulently used the said forged Bill of Exchange as genuine knowing it to be forged and that he has thereby committed an offence punishable under ss. 471 and 467 of &c.

Where the forgery consists in altering a true instrument, the offence may still be described as a forgery of the whole.

It is not necessary to mention the person upon whom the forgery has been passed off, or attempted to be so. (Arch. 466.)

"Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, erasure, even of a letter, in any material part of a true instrument, whereby a new operation given to it, will amount to forgery; and this, although it be afterwards executed by another person ignorant of the deceit. (2 Russ. 391.) And individuals falsifying their own book of accounts, and producing them in evidence before a Court of Justice, was held by the Bombay F. U. to have committed forgery." (3 M. Dig. 122, s. 138.)

Entries by a prisoner containing a false statement that a person was alive, for the purpose of enabling a pension to be drawn by a dead man, may be evidence of intention to cheat or commit criminal misappropriation, but do not amount to forgery. (Cr. R. A. 12, 1870. Scotland, C J. and Collett, J.; Feby. 21, 1870.)

Writing a spurious invitation to dinner might be very culpable as a hoax. but would not be a fraud upon any one, this was held not to be forgery. (Per Cresswell. J., Reg. vs. Marcus, 2 C. & K. 356) (see also 11 Bomb. H. Ct. Rpts. p. 3.)

Where a conviction is sought under s. 467 the document must be described so as to bring it within the terms of the Section, and such description is material and must be made out. So, if the prisoner is indicted for uttering a forged document, he cannot receive the enhanced punishment for uttering a document described in s. 467, unless the indictment has so charged his offence (6 Bomb. C C. 43.)

## (No. 54.) Bigamy.

That he, the said John Brown, on the day of had a wife living named Sarah Brown, (who had been continually absent from the said John Brown for the space of 7 years and had not been heard of by him as being alive within that time,) and that he, on the said day, married one Elizabeth Smith, the said last named marriage being void by reason of its taking place during the life of the said Sarah Brown, (and that he, the said John Brown, did not before the said last named marriage, inform the said Elizabeth Smith of the real state of facts connected with his said first marriage so far as the same were within his own knowledge,) and that he has thereby committed an offence punishable under s. 494 of &c.

See pages 547, 533 and 487. S.L.

(No. 55.) Adultery.—This charge is unnecessary, as s. 497 is omitted in the Straits Penal Code.

(No. 56.) Enticing away a Married Woman.

That he, on or about the day of enticed away from her husband (or from one who then had the care of her on behalf of her husband) a certain woman named who then was and whom he the said then knew (or had reason to believe) to be the wife of one with intent that she might have illicit intercourse with him the said (or with a certain other person named ) and that he has thereby committed an offence punishable under s, 498 of &c.

See page 521. S.L.

# (No. 57.) Defamation.

That he, on or about the day of defamed AB, by writing and publishing concerning him the following words (here insert the defamatory matter) and that he has thereby committed an offence punishable under s. 500 of &c.

The truth of an accusation will not always be in itself a sufficient defence. Private life ought to be sacred, and where no advantage is to be derived from publishing abroad the vices of another, the fact that those vices exist will not justify the act. But there are certain cases in which a man's private sins are

a matter of public concern. It would be lawful to publish the infidel opinions of a clergyman, though not of a physician; the adulterous practices of a physician, though not of a barrister. These are matters in which the private vice becomes material, as affecting the discharge of a public duty. (See Kelly v. Pinling, 1 LR. QB. 699.)

The law as laid down by the Code differs from the English criminal law, though, on this occasion on the side of lenity. By English law, you might criticise the acts of a public servant, but you might not disparage his character; you might say that particular conduct was unwise, impolitic, or illegal, but you might not say that the official behaved corruptly, maliciously, or treasonably. (See Rex. v. Lambert, cited 1 Russ. 327.

The words "in good faith" are defined by s. 52, as involving due care and attention.

As to the burthen of proof, in cases where an imputation is justified on the ground that it was made in good faith, the following remarks of the original Commissioners may be cited with advantage.

"Whether an imputation be or be not made in good faith is a question for the Courts of Law. The burthen of the proof will lie sometimes on the person who has made the imputation, and sometimes on the person on "whom the imputation has been thrown. No general rule can be laid down. Yet scarcely any case would arise respecting which a sensible and impartial "Judge would feel any doubt. If, for example, a public functionary were to prosecute for defamation a writer who has described him in general terms as incapable, the Court would probably require the prosecutor to give some proof of bad faith. If the prosecutor had no such proof to offer, the defendant would be acquitted. If the prosecutor were to prove that the defendant had applied to him for money, had promised to write to his praise if the money were advanced, and had threatened to abuse him if the money were "withheld, the Court would probably be of opinion that the defendant had not written in good faith and would convict him."

"On the other hand, if the imputation were an imputation of some particular fact, or an imputation which, though general in form, yet implied the truth of some particular fact which, if true, might be proved, the Court would, probably, hold that the burden of proving good faith lay on the defendant. Thus, if a person were to publish that a Collector was in the habit of receiving bribes from the Zemindars of his district, and were unable to specify a single case, or to give any authority for his assertion, the Courts would probably be of opinion that the imputation had not been made in good faith." (Report 1837 p. 103.)

## (No. 58.) Criminal Intimidation.

That he, on or about the day of criminally intimidated AB, (by threatening to cause grievous hurt to one CD, with intent to eause the said AB to do an act which he was not legally bound to do, that is, to give money to the accused) and that he has thereby committed an offence punishable under s. 506 of &c.

Note.—The words in italies are probably not necessary, at least in the Mofussil, but if any part of the description of the offence is set out the whole is necessary.

(No. 59.) Attempt to commit House-breaking.

That he, on or about the day of did attempt to commit house-breaking in the house of one and in such attempt did an act towards the commission of the offence, and that he has thereby committed an offence punishable under s. 511 and s. 453 of &c

Note.—No separate count for an attempt is necessary where the completed offence is charged. Where a prisoner has been indicted for committing any offence the Jury may find him not guilty of committing, but guilty of attempting to commit the offence under this Section. The indictment must specify not only s. 511 but the Section of the Code under which the offence, if completed, would have been punishable, as a reference to both Sections is necessary to determine the penalty. (2 WR. CL. 2.)

Charges of attempts must, of course, contain a correct legal description of the offence attempted, but need not state it in as much detail as a charge of actually committing the offence. For instance, a count for an attempted theft need not specify the goods which the thief attempted to steal, since that cannot always be known. (Reg. v. Johnson, 34 LJ. MC. 24; L. & C. 489.) But an indictment for an attempt to cheat was held insufficient which simply stated that the prisoner "did unlawfully attempt and endeavour fraudulently, falsely and unlawfully to obtain from the A. Insurance Co. £22 10s., with intent thereby then and there to cheat and defraud the said Company." (Reg. v. March, 1 Den. C. C. 505.) Here, not only the indictment gave the prisoner no information as to the nature of the offence which was charged against him, but it stated nothing which, if admitted, amounted to an offence.

## (No. 60.) Theft after a previous conviction.

That he, on or about the day of committed theft, by dishonestly taking one gold bangle then in the possession of one A B, out of his possession without his consent, and that he has thereby committed an offence punishable under s. 379 of the Penal Code. And the said (defendant) stands further charged that he, before the committing of the said offence, that is to say, on the day of had been convicted of an offence punishable under Chapter XVII of the Penal Code with imprisonment for a term of three years, that is to say, the offence of house-breaking by night, (describe the offence in the words used in the Section under which the penalty is imposed) which conviction is still in full force and effect, and that he is thereby liable to enhanced punishment under s. 75 of the Penal Code.

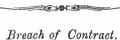
Note.—The date of the previous conviction ought to be mentioned in the charge, since, in order to render s. 75 of the Penal Code applicable, it is necessary that the previous offence should have been committed since the 1st of January, 1862, when that Code became law. (1 R. J. & P. 562.)

If the accused person has been previously convicted of any offence, and if it is intended to prove such previous conviction for the purpose of affecting the punishment which is to be awarded, the fact of the previous conviction

must be stated in the charge. If it is omitted it may be added at any time before sentence is passed, but not afterwards.

If the prisoner admits the fact of the previous conviction further trial is of course unnecessary. If he pleads not guilty to it also, then the previous conviction must be proved in the manner pointed out, and evidence must be given to identify the prisoner with the person named in the previous conviction. This is generally done by some one who was present at the first trial, or who has had the prisoner under his charge upon the former sentence. The finding that he was previously convicted must then be entered on the record, and the aggravated sentence can be passed.

See pages 482, 486 and 550 and C. P. Ordinance VI of 1873. S.L.



That the said Soopen on the day of being bound by a lawful contract in writing to work for the Municipal Commissioners of Penang, as an artificer, workman or labourer for a period of 24 calendar months in any Department of the Municipal Works in Penang aforesaid, to which by virtue of the contract he had been conveyed at the expense of the Municipal Commissioners \* voluntarily deserted the service of the Municipal Commissioners during the continuance of his contract and thereby committed an offence punishable under s. 492 of &c.

2ndly.—Same as above to mark thus \* and continue as follows:—without reasonable cause refused to perform the service which he had contracted to perform, such service being reasonable and proper service, and thereby committed an offence punishable under s. 492 of &c.

Concealing Birth. See page 547 where this form is given. S.L.

## Attempt to commit Suicide.

That on or about the day of at Penang, he the said Gunny attempted to commit suicide, and in such attempt did an act towards the commission of such offence, and thereby committed an offence punishable under s. 309 of &c.

### Insult.

That A B on the day of at Singapore, intentionally insulted and thereby gave provocation to one CD, by (here state the insult) knowing it to be likely that such provocation would have caused the said C D to break the public peace or commit any other offence, and thereby committed an offence punishable under s. 504 of &c.

Criminal Trespass.

That the said A B on the day of at Penang Road, in Penang, did commit criminal trespass by entering upon land in the possession of C D with intent to commit an offence (or to intimidate, insult or annoy the said C D) and that he has thereby committed an offence punnishable under s. 447 of &c.

See pages 498 & 500. S.L.

Indecent exposure of person.

That the said A B on the day of on Prangin Road, in Penang, committed a public nuisance, by wilfully and indecently exposing his private parts in sight and view of divers persons thereon and that he has thereby committed an offence punishable under s. 290 of &c.

False Weight.

That the said A B on the day of at Penang, fraudulently did use a certain instrument for weighing, to wit, a carry weight, which he knew to be false and that he has thereby committed an offence punishable under s. 264 of &c.

Rash Driving.

That the said A B on the day of in Penang did drive a vehicle, to wit, a buggy on a certain public highway, to wit, Light Street, in a manner so rash (or negligent) as to endanger human life (or to cause hurt to one C D) and thereby committed an offence punishable under s. 279 of &c.

Hurt by rash or negligent driving see ss. 337 and 338 and Form No. 34, p. 558. S.L.

Attempt to commit an offence.

That the said A B on the day of at Penang, did attempt to commit the offence of cheating, by falsely pretending to one C D, that he the said A B was in the civil service of the Government of the Straits Setlements, with intent to deceive the said C D, and thereby dishonestly to induce the said C D to deliver certain goods to the said A B on credit, for which he the said A B did not mean to pay and that he has thereby committed an offence punishable under ss. 511 and 417 of &c.

See notes to Form No. 59, p. 566. S.L.

Compiled and arranged by S. Leicester.

Printed at the Commercial Press, by HEAP LEE & Co.,

PENANG.

1877.

PRIVY COUNCIL CASE, Vol. VI, p. 381.

July 6, 7, 8 & 28, 1875.

Present:—Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

YEAP CHEAH NEO and others.......Appellants; and

ONG CHENG NEO......Respondent.

On Appeal from the Supreme Court of the Straits Settlements, in its Division of Penang.

English Law in Penang—Will—Construction—Gift of Residue to Executors, whether absolute or in trust—Gifts void for uncertainty—Perpetuity—Power of Appeal from the Supreme Court of Penang.

A testatrix, after appointing four executors, made over to them by her will "as such" all her property and effects, "but in trust always for the purposes hereinafter mentioned;" and after directing them to preserve certain houses as a family house, and giving certain specific bequests, disposed of the residue of her estate as follows:—

"As regards the remainder of my real and personal property of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and I direct that they, their heirs, successors, representatives, or descendants, may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just":—

Held, that, according to the true construction of the above clause, there was no absolute gift to the executors as individuals. The residue was not severed from the trust with which the testatrix had clothed all her property in the hands of her executors, but although a trust was intended to be created, it failed for want of adequate expression of it.

A gift "of the upper storey of four specific houses or shops, to be occupied by the several members and descendants of K. S. C. and L. K. W. as already proposed;" i.e., as the context shewed, as a family house for the use of two separate families, held to be void for uncertainty, and as denoting an intention to create a perpetuity.

A devise of "two plantations, in which the graves of the family are placed, to be reserved as the family burying place, and not to be mortgaged or sold," is void as a devise in perpetuity.

A direction "that a house for performing religious ceremonies to my late husband and myself be erected" is void; such a devise being in perpetuity and not for a charitable use.

The law of England must, having regard to the Royal Charters of 1807, 1826, and 1855, be taken to be the law of Penang so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. English statutes, therefore, in their nature inapplicable to Penang are not introduced along with the general law of England.

Mayor of Lyons v. East India Company (1) approved.

(1) 1 Moore, P. C. 175.

The rule however which prevails in *England* against perpetuities, which exists independently of statutes, and is founded upon public policy, is part of the law of the colony; so, also, the exception to that rule which exists in favour of charitable uses, passes with the rule into the said law.

Choah Choon Nich v. Spottiswoode (1) approved.

The power of appeal to Her Majesty, and the authority of the Supreme Court of the Straits Settlements to grant leave to do so, contained in the Letters Patent of the Queen of the 10th of August, 1855, were not abrogated by Ordinance No. 5 of 1868, establishing the Supreme Court. All the provisions of the repealed Letters Patent applicable to the old Court were virtually re-enacted by the Ordinance, and made applicable to the new Court which was put in its place.

Appeal from a decree of the Supreme Court of the colony of the Straits Settlements in its division of Penang, dated the 24th of July, 1872, and also from a subsequent order of that Court (July 4, 1873) refusing leave to appeal against such decree. Special leave to appeal was granted by Her Majesty in Council on the 2nd of February, 1874.

The nature of the questions decided, and the manner in which they arose, appear on the face of the judgment of their Lordships. It may be convenient to the reader to add to the clauses of the will therein set out the 11th and 14th, which are as follows:—

- "Eleventh:—My two plantations at Batu Lanchang comprised in bill of sale, registered No. 100 and 131 respectively, in which the graves of the family are placed, I direct to be reserved as the family burying place, and not to be mortgaged or sold."
- "Fourteenth:—I direct that my funeral expenses shall be such as my executors and other friends may think proper, and I further direct that a house termed "Sow Chong" for performing religious ceremonies to my late husband and myself be erected on some part of the ground of the four shops or houses, already so often referred to, and of such size and description as to my executors may seem fit and proper."
- Mr. Hemming, Q. C., and Mr. Ford North, for the Appellants, contended, amongst other things, that by the residuary clause of the will there was a good gift of the residue, and an absolute disposing power and ownership over it given, to the Appellants and Lim Cheng Keat beneficially. The trust with regard to the upper storey of four shops contained in clause 2, and the trusts respectively declared in clauses 11 and 14, were valid, free from uncer-

<sup>(1)</sup> Woods' Oriental cases (see page 421 of this work. S.L.)

tainty, and constituted no infringement of the rule against perpetuities. There was a beneficial gift of the residue to the executors: See Williams v. Arkle (1); Morice v. Bishop of Durham (2); Gibbs v. Rumsey (3.)

Mr. F. J. Stephens, Q. C., and C. Russell, for the Respondent Ong Cheng Neo, contended that the trusts declared in clauses 2, 11, and 14 were void for uncertainty, and as creating perpetuities; that where the trusts were inadequately expressed, the subjects thereof fell into the general residue of the testatrix's estate; and that by the 15th, i.e., the residuary clause of the will, the residue was vested in the executors as trustees, and not as beneficiaries, with a resulting trust in favour of the testatrix's next of kin. Upon this last clause the question was, whether any trust was declared, it being immaterial whether it was a good trust or not. The executors were described as trustees with the necessary powers, and the case came within Morice v. Bishop of Durham, and not within Gibbs v. Rumsey.

Mr. Hemming, Q. C., replied.

THE JUDGMENT OF their LORDSHIPS was delivered by SIR MONTAGUE E. SMITH.

This is an appeal from a decree of the Supreme Court of the Straits Settlements (Division of Penang), in a suit in equity, brought by the first Respondent, Ong Cheng Neo, against the Appellants, the executors of the will of Oh Yeo Neo. Some of the legatees under the will were also made Defendants in the suit. The first Respondent claimed to be entitled as the half-sister and one of the next of kin of the testatrix. She did not dispute the validity of the will, but contended that the bequest of the residue and some of the specific bequests were void.

The testatrix and the parties to the suit were Chinese, dwelling in *Penang*, and the real property devised by the will is situated in that island.

The first question raised in the appeal related to the right of Ong Cheng Neo to maintain the suit. It was not disputed that she and the testatrix were daughters of the same mother, Cheah Tuan Neo; but it was contended that Ong Cheng Neo was not legitimate. It appears that the testatrix was the only child of Cheah Tuan Neo, by her husband Oh Wee Kee, who died in 1806. It is said that in 1809 the widow, Cheah Tuan Neo, married Ong Sai, and that the Respondent, Ong Cheng Neo, and a deceased sister, were the offspring of that marriage. The Appellants do

<sup>(1)</sup> Unreported, House of Lords, June 7, 1875.—(2) 10 Ves. 535.—(3) V. & B. 294.

not deny that the widow and Ong Sai cohabited from 1809 until Ong Sai's death in 1811 or 1812, but they dispute the alleged marriage. A great deal of evidence was gone into upon the question, to which their Lordships do not think it necessary to advert in detail, since they are perfectly satisfied with the conclusion at which the learned Judge below has arrived, viz, that the marriage was established.

It was not disputed that Ong Sai and Cheah Tuan Neo lived together as man and wife, and were so treated by their family and friends, nor that the Plaintiff and her deceased sister were regarded and treated as legitimate children. So much was this the case, that the testatrix herself had allowed her sister, Ong Cheng Neo, to take out administration to the mother's effects. In addition to strong and consistent evidence of reputation, witnesses were called who were present at the marriage festivities; and although some of the usual ceremonies, such as the giving away of the woman, were not distinctly proved to have taken place, there is ample evidence from which, at this distance of time, the performance of them may be presumed.

The principal opposing evidence came from some members of the family, who say they were not present at any marriage ceremony, and did not know that any had occurred, and of a witness who deposed that the testatrix had spoken of the connection of her mother with  $Ong\ Sai$  as a shameful one. But the Judge below has expressly found that this last witness was not worthy of credit, and the evidence of the other witnesses relates to facts of a negative or inconclusive character, which the Judge rightly thought was insufficient to countervail the positive evidence of the witnesses who were present at the marriage festivities, and the presumption arising from reputation.

It is said that, with the Chinese, the difference between the social status of a wife and that of a concubine, and in the position and treatment of legitimate and illegitimate children is so slight, that what is termed reputation affords no satisfactory ground for presuming a marriage. But if this be so, which, however, is not very clearly established, their Lordships see no reason, in the absence of satisfactory evidence to the contrary, why the ostensible relations of the parties should not be referred to a legitimate and correct connection, rather than to an illegitimate, and, to say the least, a less correct one.

The will in question is drawn in the style of an English will, and attested according to English law; and the main question in

the suit, viz, the effect of the bequest of the residuary estate to the executors, was discussed and argued at the bar upon the principles which govern such a bequest in an English will.

The will commences as follows:-

- "Know all men by these presents that I, Oh Yeo Neo, Chinese single woman, being of sound mind, do hereby make and publish this my last will and testament.
- "I am now possessed of considerable property in money, houses, lands, and so forth, and of four shops or houses in Beach Street, numbered respectively 40, 41, 42, and 43, comprised in two bills of sale, registered respectively No. 313 and 1930, and of two Government grants for land reclaimed from the sea, and forming part and parcel of the four shops or houses, just mentioned, these four shops or houses having been left by my late husband, Lim Kong Wah, who died about twenty-six years ago.
- "Having no children of my own, and having every confidence in Yeap Cheah Neo, the wife of one of the partners of my husband, named Khoo Seck Chuan, with whom I have long lived, in Khoo Kay Chan, her son, in Khoo Siew Jeong Neo. her daughter, and in Lim Cheng Keat, a nephew of Lim Kong Wah, her son-in-law, I do hereby appoint them the executors of this my last will and testament, and I do hereby make over to them as such all property and effects whatsoever that may belong to me at the time of my death, but in trust always for the purposes hereinafter to be mentioned.
- "1st. As my long experience tells me that nothing tends so much to the prosperity, happiness, and respectability of a family as keeping its members as much as possible together, it is my wish that the four shops or houses left by my late husband should continue to be the family house and residence of the family of Khoo Seck Chuan, referred to above, and also of any part of the family of Lim Kong Wah, my late husband, now residing in China, who may visit this island, and that they shall neither be mortgaged nor sold.
- "2nd. With this object in view I direct my executors, as soon after my death as possible, to lease to two of their number, named Khoo Kay Chan and Lim Cheng Keat, their heirs and assigns, the lower storey of the said four houses or shops, that is to say, the whole of the shops, warehouses, and all other places in the premises now used for such purposes, or that may be added thereto, for a period of forty years from the day of my death, at the rent of 100 dollars per month for each and every month du-

ring the said period of forty years. The upper storey of these same four houses or shops to be occupied by the several members and descendants of Khoo Seck Chuan and Lim Kong Wah, as already proposed."

The testatrix then in other clauses (numbered 3 to 14), by way of directions to her executors, makes specific dispositions of portions of her property, principally for the benefit of members of the families of Khoo Seck Chuan and of Lim Kong Wah, her late husband.

Some of these clauses raise questions apart from the gift of the residue, which have to be decided in this appeal.

The concluding clauses of the will are as follows:—'15th. As regards the remainder of my real and personal property, of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and I direct that they, their heirs, successors, representatives, or descendants, may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just.

"16th. It is my wish that my executors may not be interfered with in the management of my affairs, and that any one of them accepting this trust shall be competent to manage it, and that in the management thereof the wish of the majority shall prevail. I direct that if any of my executors from absence, death, or any other cause, become incompetent to act, that the continuing executors appoint other executors or trustees in his or their place and stead. It is my wish also that each of my executors shall only be liable for his own acts and intromissions, and not for those of the others of them."

It will be seen from the will that the testatrix wished to benefit the relatives of her late husband, some of whom lived in China, and also the family of her husband's partner, Khoo Seck Chuan, some of the latter being her executors and trustees.

It was contended on the part of the Appellants that the residuary clause contained an express bequest to the executors in terms which imported an absolute gift to them; and a recent decision of the House of Lords (Williams v. Arkle) was cited to establish that in the case of such a devise the Statute of the 11 Geo 4 & 1 Wm. 4, C. 40, had no application. Their Lordships entirely concur in that view of the statute; but the question of the nature and character of the bequest remains, and it has to be decided whether, according to the proper and natural construction of the

language and provisions of the will in question, regarded as a whole, the intention was to create a trust in the residue, or to make a beneficial gift of it to the executors. This question, in all cases of the kind, must be determined, as Lord Cottenham said in Elis v. Selby (1), upon the construction of the language of the instrument in each particular case.

In entire accordance with Lord Cottenham's view the present Lord Chancellor, (2) in delivering his opinion to the House of Lords in Williams v. Arkle, said:—"Where an express devise of the residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of construction."

In the numerous decisions which are found in the books on this subject, various matters have been relied on as indicia of intention on the one side or the other, such as the use of the words "upon trust;" the gift of specific legacies to the executors or trustees and the mention of the executors by their proper names. Indicia of this kind, on which eminent Judges have relied, may no doubt afford in some cases useful aids to construction, but after all they may, and often must, be modified by the provisions and language of the particular instrument to be construed.

Mr. Hemming, for the Appellants, cited what he described to be two representatives cases on the subject: Morice v. Bishop of Durhum and Gibbs v. Rumsey.

He did not deny the principle laid down by Lord Eldon in Morice v. Bishop of Durham, that "If the testator meant to create a trust, and not to make an absolute gift; but the trust is ineffectually created, or is not expressed at all, or fails, the next of kin take." Indeed, he cited that case as a leading authority, but he contended that the present one fell within the decision of Sir W. Grant in Gibbs v. Rumsey, who there held that the words of a residuary clause giving the residue to the trustees and executors "to be disposed of unto such person and persons, and in such manner and form, and in such sum and sums of money as they in their discretion shall think proper and expedient" did not in the particular will before him import a trust, but an absolute gift to the trustees.

This case of Gibbs v. Rumsey is the authority on which the Appellant's counsel most strongly relied, but it is to be observed with regard to it that even if the present will were not distinguishable (a question to be presently considered), Lord Cottenham certainly expressed no approval of the case in Ellis v. Selby, and

<sup>(1) 1</sup> My. & Cr. 298. (2) Lord Cairns.

Wood, V. C., in Buckle v. Bristow (1), spoke of it as going to the verge of the law.

Coming to the will in question, it will be seen that, in the commencement, the testatrix, after appointing four executors, makes over to them "as such" all her property and effects, "but in trust always for the purposes hereinafter mentioned," words which, taken alone, indisputably impress a trust upon the whole property.

The 1st and 2nd clauses shew the desire of the testatrix to keep the family together, and for this purpose she directs the executors to preserve certain houses as a family house, for the residence of the family of Khoo Seck Chuan, and of any members of her late husband's family living in China who might visit Penang; and she directs what appears to be a beneficial lease of some shops in the lower part of the houses to be granted to two of the executors for forty years.

By a further clause the testatrix directs \$50,000 to be given on loan to the same two executors for forty years, at 5 per cent interest but directs that the rents of the shops and their interest shall become part of her trust estate.

There are numerous other specific bequests, but it appears that they are far from exhausting the estate, and that a large residue will be left. The clause disposing of this residue has been before set out at length. In trying to reach its meaning, it is to be observed that it contains no words of gift, but directions to the executors, and that they are mentioned by that title, and not by name. The first direction is to collect and receive the residue; the next, "that they, their heirs, successors, representatives, or descendants, may apply and distribute the same (all circumstances duly considered) in such manner and to such parties as to them may appear just." These are neither usual nor apt words of absolute gift; on the contrary, they indicate an intention to impose a trust to distribute the fund among persons other than, or at all events, in addition to themselves.

It may be inferred from the rest of the will that the persons intended to be benefited were the members of the families she desired to keep together. It was said that the words give an indefinite and unlimited power of disposition, and, therefore, amount to an absolute gift. But it is evident from the whole will that this was not the intention of the testatrix, and that, on the contrary, she had in her mind throughout the desire to benefit

<sup>(1) 10</sup> Jur. (N. S,) 1095.

two families, although she has failed to define her object with the requisite certainty.

That this was her real purpose, and that it was her intention to create a trust to carry it into effect, seems to be apparent both from the general frame of the will, and its particular provisions.

Looking only to the bequests to the executors, what appears? The first bequest vests all the property in the executors "as such" and "in trust always" for the purposes thereafter mentioned. Then turning to the residuary clause, the use of words of injunction instead of those of gift or bequest, the directions given to the executors, not by name, but by the description of "my executors," the nature of these injunctions, viz., to collect the residue and distribute it, after duly considering all circumstances, to such parties as to them, their beirs, successors, &c. may seem just, and the mention of successors in relation to this duty, all negative the supposition that the testatrix intended to sever the residue from the trust with which she had clothed all her property in the hands of her executors, and to make an absolute gift of it to them as individuals.

It was said that the learned Judge of the Supreme Court laid too great stress on the inference arising from the clause relating to the management of the estate, and the appointment of new executors and trustees. Undoubtedly, in any view of this case, there were trusts to be performed, which would make such a clause pertinent; and if there had been plain words of gift to the executors, as in Williams v. Arkle, little weight could be attached to this clause. It is enough for their Lordships to say of it, agreeing so far with the learned Judge below, that, in their opinion, its provisions and language are more consistent with the construction they have put on this will, than with the opposite view of it.

It will be seen from the above analysis of the will in question, that it differs in material respects from that in Gibbs v. Rumsey. There property was devised to the executors upon trust to sell and to pay certain legacies, and this was followed by a clear gift of the residue, introduced by the apt words, "I give and bequeath," to the trustees and executors, whose names were given in a parenthesis, with absolute power of disposition, and without any indication of the families or persons whom the testatrix desired to benefit. This will, both in its frame and provisions, materially differs from that now in question.

Several cases were cited in the argument, in which various forms of expressions, conferring unlimited and unconditional powers

of disposition, were held to amount to absolute gifts. It is nunecessary, however, to discuss these decisions, or to consider what would be the proper construction of the discretionary power in this will if it had been coupled with plain words of gift, uncontrolled by other parts of the will. Their Lordships' decision, founded on the whole will, is, that a trust was intended to be created, which has failed for want of adequate expression of it.

The decree below has declared several of the specific bequests to be void; and as regards three of them, the decree is complained of in this appeal.

These are, first, the devise of the upper storey of the fourshops in trust for a family residence of the families of Lim Kong Wah and Khoo Seck Chuan, which is declared to be void "for uncertainty and as infringing the rules against perpetuities;" secondly, the devise in the 11th clause of two plantations, in trust to be reserved as a family burying-place, with a prohibition against mortgaging or selling the same, which is declared void, "as infringing the rule against perpetuities;" and, thirdly, the devise in the 14th clause, directing that a house, termed Sow Chong, for performing religious ceremonies to the testatrix's deceased husband and herself, should be erected, as to which the decree declares, "that the said trust not referring to a charitable object, is void, as infringing the rule against perpetuities."

In considering what is the law applicable to bequests of the above nature in the Straits Settlements, it is necessary to refer shortly to their history.

The first Charter relating to Penang was granted by George III, in 1807, to the East India Company. It recited that the Company had "obtained by cession from a native prince," Prince of Wales' Island, and a tract of country in the peninsula of Malacca, opposite to that island, that when such cession was made, the island was wholly uninhabited, but that the company had since built a fort and a town, and that "many of our subjects and many Chinese, Malays, Indians, and other persons professing different religions, and using and having different manners, habits, customs and persuasions, had settled there." The Charter made provision for the government of the island, and the administration of justice there. It established a Court of Judicature, which was to exercise all the jurisdiction of the English Courts of Law and Chancery, "as far as circumstances will admit." The Court was also to exercise jurisdiction as an Ecclesiastical Court, "so far as the several religions, manners, and customs of the inhabitants will admit."

A new Charter was granted by George IV, in 1826, when the island of Singapore and the town and fort of Malacca were annexed to Prince of Wales' Island, which conferred in substance the same jurisdiction on the Court of Judicature as the former Charter had done.

The last Charter granted to the East India Company, in the year 1855, again conferred the like powers on the Court; and this jurisdiction was not altered in its fundamental conditions by the Act of 29 & 30 Vict. c. 95, and the Order of the Queen in Council made in pursuance of it, by which the Straits Settlements were placed under the government of Her Majesty as part of the colonial possessions of the Crown, nor by Ordinance No. 5 of 1868, constituting the present Supreme Court.

With reference to this history, it is really immaterial to consider whether Prince of Wales' Island, or, as it is now called, Penang, should be regarded as ceded or newly-settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Company. In either view the law of England must be taken to be the governing law, so far as it is applieable to the circumstances of the place, and modified in its application by these circumstances. This would be the case in a country newly settled by subjects of the British Crown; and, in their Lordships' view, the Charters referred to, if they are to be regarded as having introduced the law of England into the colony, contain in the words "as far as circumstances will admit," the same qualification. In applying this general principle, it has been held that statutes relating to matters and exigencies peculiar to the local condition of England, and which are not adapted to the circumstances of a particular colony, do not become a part of its law, although the general law of England may be introduced into Thus it was held by Sir W. Grant that the Statute of Mortmain was not of force in the island of Grenada (Attorney-General v. Stewart (1)). The subject is discussed at large in Mayor of Lyons v. East India Company (2).

The learned Judge below has not, however, held the gifts in question to be void on the ground that they infringed any statute, but because they were opposed to the rule of the English law against creating perpetuities.

Their Lordships think it was rightly held by Sir P. Benson Maxwell, Chief Justice, in the case of Choah Choon Nioh v. Spottiswoode (3), that whilst the English statutes relating to supersti-

<sup>(1) 2</sup> Mer. 143. (2) 1 Moore, P. C. 175. (3) Woods' Oriental Cases.

tions uses and to mortmain ought not to be imported into the law of the colony, the rule against perpetuities was to be considered a part of it. This rule, which certainly has been recognized as existing in the law of England independently of any statute, is founded upon considerations of public policy, which seem to be as applicable to the condition of such a place as Penana as to Enaland; viz., to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the island if land convenient for the purposes of trade or for the enlargement of a town or port could be dedicated to a purpose which would for ever prevent such a beneficial use of it. The law of England has, however, made an exception, also on grounds of public policy, in favour of gifts for purposes useful and beneficial to the public, and which, in a wide sense of the term, are called charitable uses; and this exception may properly be assumed to have passed with the rule into the law of the colony. (See Thompson v. Shakspear (1); Carne v. Long (2).)

The question then is, whether the Judge below is right in holding that the bequests in question infringed the rule, and did not fall within the exception.

The first of them, which relates to the upper storey of the houses the testatrix desired to make a family house, appears to their Lordships to be void on both the grounds mentioned in the decree. The context shews that, in using the word "family," the testatrix meant at least two families, and that she intended to include not only descendants, but other members. From other parts of the will, and from the evidence, it would seem that children had been adopted by members of the family, and having regard to Chinese family usages, which may be properly taken into consideration in construing the will, it is probable the testatrix meant to include some, at least, of these adopted children, but what natural and adopted members of the family she really intended to benefit is left wholly obscure and uncertain. The devise is, therefore, for that reason void. Then the expression of her desire to perpetuate the family and to keep the house for their residence, and the direction that the houses should neither be mortgaged nor sold, clearly denote an intention to create a perpetuity. Their Lordships, therefore, see no ground to disturb the decree with regard to this devise.

The devise of the two plantations in which the graves of the family are placed, to be reserved as the family burying-place, and

<sup>(1) 1</sup> D. F. & J. 399. (2) 2 D. F. & J. 75.

not to be mortgaged or sold, is plainly a devise in perpetuity. The only question is whether it can be regarded as a gift for a cha-The weight of authority is against a devise of this nature being so held in the case of an English will; and the only point therefore requiring consideration can be, whether there is anything in Chinese usages with regard to the burial of their dead, and in the arrangements for that purpose in Penang, which would render such an appropriation of land beneficial or useful to the public. It is to be observed that the extent of the plantations no where appears, and it may be they contain more land than would be required for the purpose of a family burial ground. In the absence of any information respecting usages of the kind adverted to, and of the extent of these plantations, their Lordships feel unable to say that the decree on this point is wrong.

The remaining devise to be considered is the dedication by the testatrix of the Sow Chong House for the performance of religious ceremonies to her late husband and to herself. It appears to be the usage in China to erect a monumental tablet to the dead in a house of this kind, and for the family at certain periods to place, with certain ceremonies, food before the tablet, the savour of which is supposed to gratify the spirits of their deceased relatives. This usage, with the accompanying ceremonies, is minutely described by Sir P. Benson Maxwell, in his judgment in the case of Choah Choon Nich v. Spottiswoode.

Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage, and can benefit or solace only the family itself. The dedication of this Sow Chong House bears a close analogy to gifts to priests for masses for the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her deceased husband's soul and her own, was held, in West v. Shuttleworth (1), not to be a charitable use, and, although not coming within the statute relating to superstitious uses, to be void. The learned Judge was therefore right in holding that the devise, being in perpetuity, was not protected by its being for a charitable use. is to be observed that in this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for masses for the dead, or as the Christian of any church who may have devised property to maintain the tombs of deceased relatives. (See Rickard v. Robson (2), and Hoare v. Osborne (3).)

<sup>(1) 2</sup> M & K, 684, (2) 31 L, J, (ch) 896; S. C, 31 Beav, 244, (3) Law Reports 1 Eq. 585.

All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to such objects.

Their Lordships' decision on the bequest they have last considered accords with the judgment of Sir P. Benson Maxwell in the case already referred to. It appears to them that in that judgment the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the colony are correctly stated.

It remains to be observed that this appeal has been heard upon special leave granted by their Lordships after leave to appeal had been refused by the Supreme Court of the colony. This refusal proceeded upon the opinion of the Court that the power of appeal to Her Majesty and the authority of the Court to grant leave to do so contained in the Letters Patent of the Queen of the 10th of August, 1855, were abrogated by Ordinance No 5 of 1868 establishing the present Supreme Court.

It was admitted by the learned counsel for the Respondents that they could not uphold this decision; and upon referring to the Ordinance, their Lordships think the Supreme Court misconceived its effect. It is true that the Ordinance enacts, in the 1st section, that the Court of Judicature established under the Letters Patent above referred to, is thereby abolished; and that the Letters Patent shall cease to have any operation in the colony. But the 4th Section enacts, that all provisions of Acts of the Imperial Parliament, Orders of Her Majesty in Council, Letters Patent, &c., in force in the colony when the Ordinance came into operation, and which are applicable to the Court of Judicature (i. e., the Court abolished by the Ordinance), or to the Judges thereof shall be taken to be applicable to the Supreme Court (i. e., the Court established by the Ordinance) and to the Judges thereof. effect of these enactments, taken together, is that whilst the repealed Letters Patent ceased to have any operation of their own, all the provisions contained in them applicable to the old Court were virtually re-enacted and made applicable to the new Court which was put in its place, as effectually as if they had been repeated at length in the Ordinance.

The other parts of sects. 4 and 30 are entirely consistent with this interpretation.

In the result, their Lordships will humbly advise Her Majesty to dismiss the appeal, and affirm the decree of the Supreme Court. But, considering that the questions involved in the suit are novel, and in some respects of the first impression, that the litigation has arisen mainly in consequence of the obscure and uncertain manner

in which the testatrix has expressed her wishes, and that the executors were thereby placed in difficulty with respect to many of the bequests of her will, they will make no order as to costs.

Solicitor for the Appellants: Mr. T. G. Everill. Solicitors for the Respondent Ong Cheng Neo: Messrs. Walker & Martineau.

PRIVY COUNCIL CASE, Vol. vi, p. 283. 16th March, 1875.

Present:—Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Our Sovereign Lady the Queen. ... ... Appellant.

Henry Clark Mount & William } ... ... Respondents.

On Appeal from the Supreme Court of the Colony of Victoria.

Habeas Corpus—Penal Servitude for Offences triable by Colonial Courts under their Admibalty Jurisdiction—16 and 17 Vict., c. 99, s. 6.

M. and M. convicted at the Sessions of the Supreme Court of Victoria, of manslaughter committed on board a British ship on the high seas, were sentenced to penal servitude for 15 years, and were subsequently detained in a public gaol within the meaning of the Colonial Act, the Statute of Gaols, 1864. On a return to a writ of habeas corpus, to the effect that M. and M. were detained "for the cause and to the end that they may undergo the sentence aforesaid," the Court ordered that the prisoners "be discharged from their imprisonment and set at large," on the ground that, by 16 and 17 Vict. c. 99, s. 6, sentence of penal servitude could not be carried into execution in the colony without the intervention of the Secretary of State.

Held, by the Privy Council that the return was sufficient; and that in any case the Court erred in not remanding the prisoners until it was clear that no lawful means of executing the sentence could be found.

Rex v. Allen (3 E. & E. 338.) distinguished.

Although the Act (12 & 13 Vict. c. 96) under which the Supreme Court obtained jurisdiction over the prisoners only authorized a sentence of transportation according to the law of England then in force, and although 20 & 21 Vict. c. 3, which abolished transportation, and substituted penal servitude, does not in terms include the colonies, yet this latter Act is applicable to the colonies with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the former Act on Colonial Courts. The policy of the former Act was to authorize the Colonial Courts to try offences properly cognizable in England, with the consequences which would have attended a trial there; and that policy, in the absence of an expressed intention to the contrary, must govern the construction of both Acts.

The direction in 16 & 17 Vict. c. 99, s. 6, that the Secretary of State should point out the place of confinement in case of a person sentenced to penal servitude, relates only to the manner of executing the sentence, and

to matters of administration, and therefore need not be resorted to in the case of sentences passed in the colonies, which may be executed according to the local procedure.

Under the combined effect of Imperial and Colonial legislation sentences of penal servitude may be executed in *Victoria*; were this otherwise, a sentence directed by an Imperial Act may not be treated as null, because no means have been previously provided in the colony for carrying it into effect.

This was an appeal from a judgment of the Supreme Court of the Colony of *Victoria* upon the return to writ of *Habeas Corpus ad subjiciendum* to bring up the bodies of the Respondents, and a motion made thereon that the Respondents should be discharged out of custody.

The Respondents were informed against for murder on the high sens, under the authority of an Imperial Statute 12 & 13 Vict. c. 96, which provides that the Courts in any Colony shall have the same authority to try prisoners for offences committed on the sea or any place within Admiralty jurisdiction as if such offences had been committed within the jurisdiction of the Colonial Courts; and, by Sect. 2, that "if any person shall be convicted before any such Court of any such offence, such person so convicted shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force, persons convicted of the same respectively would be subject and liable to in case such offence had been committed and were inquired of, tried, heard, determined, and adjudged in England."

The Respondents were convicted of manslaughter, and sentenced respectively to fifteen years' penal servitude; in accordance with the following opinion of the Judges:—

"The Judges are of opinion that the prisoners cannot be sentenced to transportation, but may be sentenced to be kept in penal servitude for life, or for any term not less than seven years. The execution of that sentence would seem to be a matter of Imperial duty, as the place in which the prisoners are to be confined depends upon the directions of one of Her Majesty's Principal Secretaries of State (16 & 17 Vict. c. 99, s. 6)."

After the passing of the said sentence the Respondents were removed to, and confined in custody at, Her Majesty's Gaol at Melbourne, then being a penal establishment within the meaning of the Statute of Gaols Act, 1864, and afterwards, on the 20th of May, 1873, the Inspector-General of Penal Establishments directed, by warrant under his hand, that the Respondents should be removed to Her Majesty's Gaol at Pentridge, being also a penal establishment within the meaning of the said Statute of Gaols,

1864, there to be detained until the expiration of their sentence, or until discharged, or removed by lawful authority, and the Respondents were to have been removed to Her Majesty's Gaol at Pentridge.

Afterwards, on the 12th of December, 1873, a writ of Habeas Corpus ad subjiciendum was issued out of the Supreme Court, directed to the Inspector-General of Penal Establishments, requiring him to bring up the bodies of the two Respondents, and the Inspector-General of Penal Establishments, on the 16th September, 1873, made the following return:—

"I, George Oliphant Duncan, Inspector-General of Penal Establishments in the Colony of Victoria, do hereby certify and return in obedience to this writ, that before the coming of the said writ to me, to wit, on the 15th day of April, in the year of our Lord 1873, I did take into custody, and still retain in custody in gaol, the said Henry Clark Mount and William Charles Morris. under and by virtue of a certain sentence of the Supreme Court of General Gaol Delivery, holden at Melbourne on the 19th day of December, in the year of our Lord 1872, delivered in open Court (the said Court being then sitting) for a certain felony, that is to say, manslaughter on the high seas, whereof the said Henry Clark Mount and William Charles Morris had been by the said Court then and there respectively tried and convicted, which said sentence is that each of them, the said Henry Clark Mount and William Charles Morris, should be kept in penal servitude for the period of fifteen years; and I do further certify that the said Henry Clark Mount and William Charles Morris are now detained in my custody, for the cause and to the end that they may undergo the sentence aforesaid."

"Geo. O. Duncan."

The return having been read and filed, a motion was made that the prisoners be discharged on the ground that they were not in the proper custody.

After the hearing of the motion the Court delivered a judgment, in which they held that the return was bad, on the ground, among others, that by Sect. 6 of the Imperial Statute, 16 & 17 Vict. c. 99, the sentence of the penal servitude could not be carried out in any gaol in the Colony without the direction of one of Her Majesty's Principal Secretaries of State. An order of the Supreme Court, dated the 17th of September, 1873, was accordingly made, ordering the discharge of the Respondents.

THE JUDGMENT of their LORDSHIPS was delivered by SIR MONTAGUE SMITH:

The Respondents (Mount and Morris) were tried at the Sessions of the Supreme Criminal Court of the Colony of Victoria, upon a criminal information for murder committed on board a British ship on the high seas, and were convicted of manslaughter.

The Chief Justice, who tried them, entertaining doubts as to the nature of the sentence which, by law, might be passed, consulted the other Judges of the Supreme Court, who were of opinion that a sentence of penal servitude might be awarded; and, accordingly at a subsequent Sessions the Respondents were sentenced to penal servitude for tifteen years.

In pursuance of this sentence the Respondents were first confined in a gaol at *Melbourne* being a public gaol within the meaning of the Colonial Act, the *Statute of Gaols*, 1864, and were afterwards, under a warrant of the Inspector-General of Penal Establishments, removed to another gaol at *Pentridge*, being also a public gaol within the meaning of the above Act, there to be detained until the expiration of their sentence, or until discharged, or removed by lawful authority.

The Respondents, complaining that their detention in Pentridge Gaol was illegal, obtained a writ of Habeas Corpus from the Supreme Court of Victoria, to which the Inspector-General made the following return:—(His Lordship read it. (1))

After hearing arguments upon this return the Court made an order that the prisoners "be discharged from their imprisonment and set at large," mainly, as appears from their judgment, on the ground that a sentence of penal servitude cannot be carried out in any gaol in the Colony without the preliminary direction of one of Her Majesty's Secretaries of State.

The judgment on this point concludes as follows:-

"The punishment of transportation could have been enforced unless the King in Council appointed the places to which offenders were to be transported, nor unless the Secretary of State specified which of the places so appointed each particular offender was to be sent to (5 Geo.4. c.84. s.3). A sentence of penal servitude, whether passed in the *United Kingdom* or in a Colony, requires the same preliminary act of a Secretary of State (16 and 17 Vict

<sup>(1)</sup> See ante page.

c.99. s.6.). Without it the sentence cannot be put into execution. In cases of penal servitude it ascertains the place where the hard labour is to be performed, just as in ordinary cases the sentence of the Court ascertains the gaol in which imprisonment is to be undergone; and although the discipline to which the prisoners are subjected may be, as was urged by the Attorney General, the same as if the Secretary of State's direction had been obtained, the imprisonment which the prisoners are now undergoing is not in accordance with the sentence passed upon them nor is it in any way subservient or auxiliary to its execution."

The present Appeal is from the order discharging the Respondents.

It was not disputed by their counsel at their Lordships' Bar that the sentence of penal servitude was correct, and their argument was limited to alleged errors in the manner of its execution.

Before, however, dealing with these objections, it will be convenient shortly to consider the statutory law on which the sentence itself is founded.

The jurisdiction to try persons charged with offences committed on the sea within the jurisdiction of the Admiralty, was, for the first time, conferred on Colonial Criminal Courts in 1849, by the Imperial Act (12 & 13 Vict. c. 96.) For this purpose it was enacted (Sect.1) that these Courts should have the same jurisdiction for trying such offences, and be empowered to take and exercise all such proceedings for bringing persons charged therewith to trial and "for and auxiliary to and consequent upon the trial," as by the law of the Colony might have been taken if the offence had been committed upon any waters within the limits of the Colony.

The second section, which relates to the sentence to be passed in such cases, provides that convicted persons shall be subject to the same punishment as "by any law now in force" persons convicted of the same offence would be liable to in case such offence had been committed, and was "inquired of, tried, and adjudged in England."

The words "now in force" occasioned the doubts entertained by the Chief Justice as to the nature of the sentence to be passed.

At the time this Act passed the punishment for manslaughter in *England* (under the 9 Geo.4 c.3 s.9.) was transportation for life, or for a term not less than seven years or imprisonment, with or without hard labour, not exceeding four years or fine.

In consequence of the difficulty of finding suitable places to which offenders might be transported, penal servitude was substituted in some cases for this punishment by the 16 & 17 Vict. c. 99. This Act was soon followed by the 20 & 21 Vict. c. 3, which enacted that no person should be sentenced to transportation, and that persons who, if the Act had not passed, might have been sentenced to transportation, should be liable to be sentenced "to be kept in penal servitude."

It could not be disputed that penal servitude would have been a proper sentence if the Respondents had been tried in England, and the doubt thrown upon the validity of such a sentence in the Colony arises upon the question whether the words "now in force" in the 12 & 13 Vict. c. 96, allow of the application in the Colonies of the punishment substituted in England for that in force when the Act passed.

On this question their Lordships think that, although the Imperial Act abolishing transportation does not in terms include the Colonies, it is applicable to them with respect to the sentences to be passed on persons convicted in the Colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the Imperial Act on Colonial Courts. Such offences might be tried, after that Act, either in England or the Colonies, and the Legislature clearly expressed its intention that the punishment should be the same, wherever the trial might take place. This general intent and policy should, therefore, govern the construction of the Acts, unless it plainly appears from the language of the later statute that the Legislature meant to change it.

The words "now in force" in the original Act, no doubt apply in terms to the existing law. But the latter part of the section, directing that the punishment should be the same as it would have been if the offence "were inquired of, tried, and adjudged in England," shew with distinctness that the Imperial Legislature was conferring power upon the Colonies to try offences properly cognizable in England with the consequences which would have attended a trial there. The punishment was accordingly directed to be the same as it would have been by the existing law if the offence had been tried in England.

When the Imperial Legislature altered that law, and substituted penal servitude for transportation, it is reasonable to suppose that the alteration was intended to embrace sentences for offences tried in the Colonies under the special jurisdiction conferred by the 12 & 13 Vict., since there is no trace of any intention on the part of the Legislature to change the policy of that Act, which orders these sentences to be passed according to the law of England.

This construction creates no conflict between Imperial and Colonial authority and in no way affects the rights and privileges of the Colonial Legislatures. It simply affirms that the Imperial Statute which gave the Courts of the Colonies, quoad offences committed upon the seas beyond their territorial limits, a jurisdiction which their own Legislatures could not confer, was altered by a subsequent Imperial Act.

Their Lordships therefore see no reason for disagreeing with the Judges who advised the Chief Justice that a sentence of penal servitude might be passed upon the Respondents.

The only question argued at the Bar, on behalf of the Respondents, related to the manner of executing this sentence in the Colony, and must now be considered.

At the passing of the Act conferring Admiralty jurisdiction on the Colonies (12 & 13 Vict.) the punishment for manslaughter, according to English law, was, as already stated, transportation, or imprisonment with hard labour for four years.

The 17th Section of the Imperial Act (5 Geo. IV c. 84), which consolidates the earlier Acts relating to transportation, recognized the power, then existing in some Colonies, to transport offenders; and by the 4th Section of the Imperial Act, passed in the following year (6 Geo. IV c. 69), the King was empowered, by an Order in Council. to authorize Governors of Colonies to appoint places to which offenders sentenced in the Colonies to transportation should be sent.

The Colonial Acts of New South Wales, which then included Victoria (afterwards made applicable to the new Colony by the 14 Victoria No. 49), shew that an Order in Council was issued by the King under the last-mentioned Statute, and that provisions were made by the Colonial Legislature for carrying sentences of transportation into execution: see 7 Geo. IV, No. 5; 11 Geo. IV, No. 12; 3 Will. IV, No. 3.

But the same difficulty of carrying into execution sentences of transportation was experienced in the Colonies as existed in England, and accordingly by the New South Wales Act (11 Vict. c.34), it was enacted, whilst continuing the sentence of transporta-

tion, that in lieu thereof offenders might be sentenced to be kept to hard labour on roads or public works.

Such was the state of the Colonial law relating to transportation when the Admiralty jurisdiction to try offenders was conferred on Colonial Courts (12 & 13 Vict.), and there would seem to be no sufficient reason for saying, if a sentence of transportation had then been awarded in the Colony, that its execution should have been transferred to the English authorities. The direction in the Act that the punishment should be the same as if the trial had been in England is satisfied by holding that the nature of the sentence must be the same. It could hardly have been intended, if the sentence were imprisonment, that the offender should be sent to England to be confined in an English gaol; or that the provisions relating to transportation from England, which include power to imprison in English gaols (see Geo. IV c.84 ss.18, 19.), should be put in force.

When the law of England abolished transportation, and substituted for it penal servitude, the latter, as already stated, became a sentence which might be lawfully passed by the Colonial Courts when acting under their Admiralty criminal jurisdiction.

The argument for the Respondents came to this: that there being no such punishment as "penal servitude," eo nomine, in Victoria, such a sentence could be carried into execution only in accordance with the disciplinary regulations of the English Statutes, and if those regulations were not applicable, that it could not be carried into effect at all.

It was said that the 6th clause of the Imperial Act (16 and 17 Vict.), which for the first time introduced penal servitude as a substitute for transportation, was applicable to Colonial sentences. This Section enacts that persons sentenced to penal servitude may be confined in such prison or place in the *United Kingdom* or in Her Majesty's dominions beyond seas, as a Secretary of State may direct. The Supreme Court yielded to this contention, and held that without a preliminary order of a Secretary of State appointing the prison or place where the labour was to be performed, the sentence could not be put into execution.

The question is not free from difficulty; but their Lordships, on the whole, think that the directions in the 6th clause form no part of the sentence. They are not contained in the Section of the Act, defining the nature of the sentence, nor are they embodied in it when judicially pronounced. It appears to them that

these provisions relate only to the manner of its execution and to matters of administration, and therefore need not be resorted to in the case of sentences passed in the Colonies, which, in their view, may be carried into effect in accordance with the procedure provided by them.

It is then said that no legislative provision has been made in the Colony for executing this sentence. Supposing this was so, and that a sentence of penal servitude had been absolutely new in the Colony, it could by no means follow after the Imperial Legislature had directed such a sentence to be awarded, that, when passed, it might be treated as null, because no means had previously been provided there for carrying it into effect.

But, on behalf of the Attorney-General, it is urged that means do exist in the Colony for executing an analogous sentence, which are adapted to executing that of penal servitude.

The Imperial Act, which substitutes penal servitude for transportation, defines or describes the sentence only by the following terms: that the offender "be kept in penal servitude;" "kept," of course, implies detention, and "penal servitude" compulsory labour. This, then, is the nature of the sentence.

The Colonial Act (11 Vict. c.34); provides that in lieu of transportation offenders may be sentenced to be kept to hard labour on roads or public works; and now, by the Criminal Law Consolidation Act (27 Vict. No. 233), transportation is virtually abolished in the Colony, and detention and keeping to hard labour on public works at places to be appointed for that purpose is substituted for it (sect.291).

By the Statute of Gaols, 1864, the Governor in Council may appoint places in Victoria at which offenders under such a sentence of detention shall be detained and kept to hard labour (Sect. 4), and it is directed that all gaols and bulks shall be under the charge and direction of the Sheriff, or such other officer as the Governor may appoint (Sect. 8). By a later Act (the Statute of Gaols Amendment Act, 1871), the 8th Section of the former Act is repealed, and the Governor in Council is empowered to appoint an Inspector-General of Penal E-tablishments, who was to have the charge and direction of all gaols and bulks, with power to remove prisoners under sentence from one gaol to another. This statutory officer was invested with the powers which before belonged to the Sheriff.

Moreover, by a recent Imperial Statute the Colonial Prisoners Removal Act, 1869, which in effect authorizes inter-colonial transportation, it is enacted that prisoners, "under sentence of transportation, imprisonment or penal servitude," may be removed under certain conditions and regulations, and by agreement between any two Colonies, from one Colony to the other, for the purpose of undergoing their sentence in the other Colony. This Statute recognizes "penal servitude" as a punishment existing in, at least, some Colonies, and places it in the same category with "transportation and imprisonment."

In the result, it appears to their Lordships, upon a review of the abovementioned Acts of the Imperial and Colonial Legislatures that sentences of penal servitude, in other words, of detention and compulsory service, may be carried into execution in the Colony; and, therefore, that the return of the Inspector-General that he detained the Respondents by virtue of the sentence passed upon their conviction "for the cause and to the end that they may undergo such sentence," is sufficient.

But if this were not so, and if the Judges of the Supreme Court were right in holding that an order of the Secretary of State was necessary, their Lordships think they erred in setting the prisoners at large. In any event, sometime must have elapsed after the sentence had been passed before such an order could be obtained, during which the prisoners must have been necessarily detained by the Inspector-General, as the statutory Sheriff, and in any view of the case, the Court should, in their opinion, have remanded the prisoners to his custody to give opportunity for an application to the Secretary of State for the order the Court thought necessary. The prisoners who had been convicted of felony ought not to have been set at large during the term of their sentence, until it was clear that no lawful means of executing it could be found: Ex parte Krans (1); Parker's Case (2).

The case in Rex v. Allen (3) was exceptional in its circumstances; the prisoners had been tried by a Court-Martial in India, and when he had been brought to England under an invalid warrant, there seemed to be no lawful way of carrying the sentence into effect.

For these reasons their Lordships will humbly advise Her Majesty to reverse the order under Appeal.

<sup>(1) 1</sup> B. & C. 258. (2) 5 M. & W. 32. (3) 3 E. & E. 338.

Law J. Rep., Pro. & Mat., Vol. 31, p. 153.

PROBATE.
1861.
June 12.

In the goods of LEWIS LEWIS (deceased:)

Will—Attestation—Names written by another, Witnesses holding Top of Pen.

The names of two attesting witnesses to a will, who were unable to write, were written by another person whilst they held the top of the pen: Held, that the will was duly attested.

Dr. Wambey (May 30, 1861,) moved for probate of the will of Lewis Lewis, deceased.—The only question was whether the attesting witnesses had duly subscribed the will.

It appeared from the affidavits of William Croft, who had written the will, and John Lloyd, the surviving attesting witness that after the testator had executed the will, by making his mark, in the presence of the attesting witnesses and of Croft, Croft, at the, request of John Lloyd and John Jones, the two attesting witnesses, they being unable to write, wrote their names, each holding the pen whilst his name was written.

Dr. Wambey contended that the will was duly subscribed by the attesting witnesses. Sir Herbert Jenner Fust refused to grant probate of a will where the names of the attesting witnesses had been subscribed in a similar manner in In the goods of Kileher (1); but in that case both the attesting witnesses were able to write, and there were circumstances in the case which called for explanation, and seemed to have influenced the decision.

Cur. adv. vult.

SIR C. CRESSWELL now said—The question in this case was, whether the attesting witnesses, who could not write, by holding the pen at the top whilst another person guided it and wrote their names, had duly attested the will. In Harrison v. Elvin (2), which, in its circumstances is more like the present case than any other I can find, a will had the names of two persons, Crofts and Galor, subscribed as witnesses; Crofts had written his own name, but Galor, who could neither read nor write, was called as a witness at the trial, and said that Crofts had held his hand "and wriggled it about on the paper," and that the attestation which ap-

<sup>(1) 6</sup> Notes of Cases, 15. (2) 3 Q. B. Rep. 117.

peared on the will was so written; and the Court of Queen's Bench held that the will had been properly attested. In this case I think each of the witnesses, by holding the pen, was taking some share in the act of writing his name, and I cannot discriminate the quantum. I think, therefore, that the subscription is good, and that probate of the will should be granted (3).

Motion granted.

(3) See In the goods of Frith, 27 Law J. Rep. (N. S.) Prob. & M. 6.

Law J. Rep., Pro. & Mat., Vol. 33, p. 25.

PROBATE.
1863.
Nov. 10

In the goods of sperling (deceased.)

Will-Attestation-Omission of Signature-1 Vict. c. 26. s. 9.

One of the attesting witnesses to a will instead of writing his name, wrote "servant to Mr. S," believing that to be the proper mode of subscribing the will:—Held, that this was a sufficient subscription.

Charles Robert Sperling, late of Stanmore Manor House, Middlesex, died on the 8th of July 1863, having made a will, dated March 28, 1863. Beneath the attestation clause was written:—

"George W. Harris, solicitor, Halstead.

"Servant to Mr. Sperling."

It appeared, from the affidavit of George W. Harris, a solicitor, that, on the 28th of March, he went to Stanmore Manor House for the purpose of getting the will executed; that Thomas Saunders, who had for some time been in attendance on Mr. Sperling, was called into the library, and told that Mr. Sperling was about to execute his will, and that he and Mr. Harris were to sign it as attesting witnesses; that Mr. Sperling then signed the will in the presence of Mr. Harris and of Saunders; that Mr. Harris signed his name, and then said to Saunders, "Now sign yourself here as servant to Mr. Sperling," pointing to the part of the paper immediately below his own signature; that Saunders then wrote "Servant to Mr. Sperling;" that Mr. Harris being in a hurry to catch a train folded up the paper without looking at it, and placed it in an iron chest in the deceased's library, and then left.

Thomas Saunders, in his affidavit, stated that he wrote the words "Servant to Mr. Sperling," intending such words to be his signature, and believing, from the direction given him by Mr. Harris, that that was the proper mode of attesting the will.

J. W. Chitty moved for probate of the will.—Saunders, by writing. "Servant to Mr. Sperling," with the intention that these words should be his signature, subscribed the will. It is not necessary in order that there may be a sufficient subscription, under section 9 of the 1 Vict. c. 26, that an attesting witness should subscribe his name—In the goods of Oliver (1). In that case a witness, instead of writing his own name, "John Edmunds," under that of the other attesting witness, a solicitor, inadvertently wrote "John Clerk, his clerk." It was held, by Sir J. Dodson, that this was a sufficient subscription.

SIR J. P. WILDE.—I am of opinion that there has been a substantial compliance with the requirements of Section 9 of the I Vict. c. 26. Without laying down any general rule, I am disposed to think that anything written by a witness with the intention of thereby identifying himself as a person who witnessed the execution of the will is a sufficient attestation and subscription. Probate will, therefore, be granted.

Probate granted.

(1) 2 Eccl. & Adm. 57.

Law J. Rep., Cases connected with the duties of Magistrates; vol 33, p. 63.

[CROWN CASE RESERVED.]

1863. Nov. 21. THE QUEEN v. WATTS.\*\*

Depositions, how to be taken—Statute 11 & 12 Viot. c. 42 s. 17.

To render a deposition of a witness absent through illness admissible in evidence on the trial of a prisoner for felony, it must have been taken in the presence of the Magistrate as well as of the

prisoner.

At the hearing of a charge of felony the witnesses were examined and cross examined by an attorney for the prisoner in the presence of the Magistrate, and a note was made of the heads of what they could each prove; the witnesses and the prisoner were then taken into another room, and the witnesses were there, in the absence of the Magistrate, examined by a clerk, and their answers taken in writing by him, and their signatures obtained to the paper; after which the witnesses and the prisoner were again brought before the Magistrate, and the evidence so taken was read over. The prisoner was then cautioned by the Magistrate, and having previously made a statement, signed it, and the Magistrate then signed the paper:—Held, that this course of taking the depositions was irregular, and that a deposition so taken was inadmissible in evidence.

<sup>\*</sup> Coram Erle, C.J., Wightman, J., Williams, J., Martin, B. and Bramwell, B.

This case was stated by the Deputy Recorder of Liverpool.

" The prisoner was tried before me, at a Court of Quarter Sessions of the Peace holden in and for the borough of Liverpool, on the 25th of May 1863. He was indicted for largeny from his master. It was proved that one of the witnesses examined before the committing Magistrate was unable to attend the trial as a witness by reason of illness. It was then proposed on behalf of the prosecution to put in evidence his deposition taken before the committing Magistrate, and for this purpose a witness was called. who proved that the deposition was taken in accordance with the invariable and long-established practice of the Magistrate's Court: that when the prisoner was before the Magistrate he was defended by an attorney, who had a full opportunity of cross-examining and did cross-examine the witnesses; that a note of the evidence given before the committing Magistrate, consisting of the names of the witnesses and the heads of what each could prove, was taken, by a clerk to the Magistrates; that afterwards the prisoner and the witnesses were taken into a room, and that there another clerk. who had not been present at the examination before the Magistrate, examined the witnesses from the aforesaid note in the absence of the Magistrate, and there wrote down the answers, and that the witnesses then signed the paper so written by the said last-mentioned clerk; that the prisoner's attorney was not there, though he might have been if he had liked, and that the prisoner was not asked if he would then cross-examine the witnesses, and did not cross-examine them; that afterwards the prisoner and the witnesses were again taken before the Magistrate, and the evidence so taken and written down by the clerk in the room in the absence of the Magistrate was read over to them; that the prisoner was not then asked if he would cross-examine the witnesses: that his attorney was not there, though he might have been if he had liked; that the Magistrate then cautioned the prisoner, who then signed his own statement, and the Magistrate then signed the paper so written as last aforesaid. One of the depositions contained in the said last-mentioned paper was the deposition tendered in evidence before me.

"It was objected on behalf of the prisoner that such deposition was not taken in accordance with the statute 11 & 12 Vict. c. 42. s. 17, and was therefore inadmissible; and the following authorities were cited: The Queen v. Christopher (1) and Caudle v. Seymour (2).

<sup>(1) 1</sup> Den. C. C. 536; s. c. 19 Law J. Rep. (N.S.) M.C. 103.

<sup>(2) 1</sup> Q.B. Rep. 889; s. c, 10 Law J. Rep. (N.s.) Q.B. 243.

"I admitted the deposition and the prisoner was convicted. But having doubts as to its admissibility I granted this case for the opinion of your Lordships, whether the deposition so taken was properly admitted."

Littler, for the prisoner (Nov. 14 and 21) -The deposition was not admissible against the prisoner, as it was not taken in the manner prescribed by law. The stat. 11 & 12 Vict. c. 42. s. 17. requires that the Justice "shall in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statements on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing," &c. It is clearly the intention of the statute that the statements of the witnesses should be taken down in the presence of the Justice. It is contrary to the spirit of the Act that the clerk, in the absence of the Justice, should be at liberty to put or omit to put questions as he may please. form M. given for the depositions, in the schedule to the Act, makes the Justice declare that the deposition was not only sworn but taken before him. The deposition, which was in fact taken before the Magistrate, was that paper which contained merely the heads of what the witnesses could prove. This was not returned, but that which was not taken before the Magistrate but before the clerk was returned as the deposition.

Edward James, for the prosecution.—It is very desirable that the Court should lay down a rule for the guidance of the Magistrates at Liverpool. The practice has been of long standing, doubtless arising from the press of business.

[Wightman, J.—We are informed that the practice in the Metropolitan Police Courts is to take, the depositions in the presence of
the Magistrate. Martin, B.—I do not suppose it necessary for
the Magistrate himself to write down the answers.]

ERLE, C.J.—We are all of opinion that these depositions are bad. By the statute the depositions should be taken in the presence of the prisoner and of the Magistrate. In the present case this has not been done.

The other Judges concurred.

Conviction quashed.

## Law J. Rep., Mag. Cases, Vol. 33, p. 58. [CROWN CASE RESERVED.]

1863. Nov. 14. } THE QUEEN v. THALLMAN.\*

Indecent Exposure—Common Nuisance—Public Place.

In order to render a person liable to indictment for a common nuisance by indecently exposing his person in a public place, it is not necessary that the exposure should be made in a place open to the public. If the act be done where a great number of persons may be offended by it, and several see it, it is sufficient.

Where a man exposed himself indecently on a roof at the back of a honse in London, so as to be visible to persons in the back premises of many other houses, but not so as to be capable of being seen from any place open to the public, and seven persons in one house saw the exposure, the conviction was held good.

The following case was stated by the Deputy Assistant Judge of the Middlesex Sessions.

"The prisoner was tried before me, in the Second Court at the Middlesex Sessions, on the 25th of August last, on an indictment which charged that he in a certain open and public place, that is to say, on the roof of the dwelling-house of one G. H. Cook, situate in a certain open and public street and common highway called Albemarle Street, in the parish of St. George, Hanover Square, and near the dwelling-houses of divers of the liege subjects of the Queen situate in that parish, and also in and near the said open and public street and common highway called Albemarle Street, and within the sight and view of Elizabeth A Mary D., and of many other of the liege subjects of the Queen there residing and dwelling, and along and through the open and public street and common highway there going, returning, passing and repassing, did unlawfully, wilfully, publicly and indecently expose his person and private parts naked, and did continue on the roof of the said dwelling house and near the dwelling-houses aforesaid, &c. &c., with his person exposed, &c., for the space of twenty minutes, to the great damage and common nuisance of the said E. A. and M. D. and of all other the liege subjects of the Queen then and there being, and then and there residing and dwelling, and along and through the open and public street and common highway aforesaid going, returning, passing and repassing, and against the peace, &c.

<sup>\*</sup> Coram Erle, C. J., Wightman, J., Williams, J., Martin, B. and Bramwell, B.

"The prisoner lived as a servant at a house N. 4, in Albemarle Street, Piccadilly, and on the 31st of July, while several female servants belonging to a club-house were going to bed, about eleven at night, in a room at the back of the house No. 11, in Stafford Street, the prisoner passed along the roofs of the houses, and exposed himself on that of No. 6, Albemarle Street, which was exactly opposite the window of the room where the females were. He was almost entirely naked and exposed his person. They mentioned the circumstance to the other servants, but were scarcely credited. On the following night the prisoner again appeared, and exposed himself in a most indecent manner, remaining on the roof for about ten minutes. The head-waiter of the club was sent for, and also a policeman, both of whom saw the exposure, making with five females who were present seven persons, before whom on this occasion the exposure took place.

"The house out of which the prisoner came, as well as that from which the witnesses saw him, were situate in public streets; but that part of the roofs of the different houses along which the prisoner walked did not face the public street, and his acts could not be seen by person passing along those streets, but they could be seen from the back windows, not only of houses in Albemarle Street and Stafford Street, but also from those of several houses in Bond Street.

"The prisoner's counsel submitted that the roofs of the houses did not constitute a public place, and that the exposure in the presence of the different persons as described did not amount to a public exposure, so as to make the prisoner guilty of the common law misdemeanour.

"The case was not argued before me, but it was suggested by the counsel on both sides, that it should be reserved for the opinion of the Court of Criminal Appeal and argued there. I consented to that course, being desired that the point should be settled by competent authority; and I told the jury that, in my opinion, the place and the exposure were sufficiently public to bring the acts of the prisoner within the law, if they should be of opinion that he exposed himself, in fact, indecently, wilfully and intentionally.

"The jury found him guilty. The question for the determination of your Lordships is, whether I was right in so ruling. If I was, the verdict is to stand—otherwise not.

"The prisoner, not being able to find bail, is in prison awaiting the decision of your Lordships."

Best (Besley with him) for the prisoner,—The conviction is wrong. To support this indictment the exposure should have

been proved to have been in some public place. The place where the prisoner exposed himself was not in a public place, nor could it, be seen from any public place, or highway. The backs of the houses from which alone the exposure could be viewed were not accessible to the public. In Sir Charles Sedley's case (1), the exposure was from a balcony looking into Covent Garden. In The Queen v. Webb (2), an exposure to a woman in the passage of a public-house was held insufficient. The Queen v. Orchard (3), decides that exposure in a urinal in a market-place is not sufficiently public. The prisoner's conduct may have been a private nuisance to particular persons, but it is not an indictable public nuisance.

No counsel appeared for the prosecution.

ERLE, C.J.—We are all clearly of opinion that it is not necessary to render a person liable to indictment for exposing himself in a public place that the place must be a public highway. If he stands in a place, where a great number of persons may be affected by his criminal act, he is liable to indictment. There is, we think, in this case abundant evidence to support the conviction.

The other Judges concurred.

Conviction affirmed.

(1) 1 Sid. 168. (2) 3 Cox, C.C. 183. (3) Ibid. 248.

# CHARTER OF THE STRAITS SETTLEMENTS.

(PRINCE OF WALES ISLAND, SINGAPORE, AND MALACCA.)

Charter passed under the Great Seal for Erecting the Straits Settlements into a separate Colony, and for providing for the Government thereof.

Letters Patent, dated 4th February, 1867.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith: To all to whom these Presents shall come, Greeting.

Whereas by an Act made and passed in the Twenty-ninth and Thirtieth Year of Our Reign, intituled "An Act to Provide for the Government of the Straits Settlements," it was Enacted that it should be lawful for Us, by Order to be by Us made with the advice of Our Privy Council, to Declare that the said Act should come into Operation at a time to be specified in such Order in Council, and that at such time the Islands and Territories known as the "Straits Settlements," namely, Prince of Wales Island, the

Island of Singapore, the Town and Fort of Malacca, and their Dependencies, should cease to be Part of India for the purposes therein mentioned, and that from and after the coming into operation of the said Act, it should be lawful for Us by any Letters Patent under the Great Seal of Our United Kingdom, or by any Instructions under Our Sign-Manual and Signet accompanying and referred to in any such Letters-Patent, to Delegate to any Three or more Persons within the said Settlements aforesaid, or within any part or Dependency thereof, either in the whole or in part, and upon, under, and subject to all such Conditions, Provisoes, and Limitations, as by any such Letters-Patent or Instructions as aforesaid We should see fit to prescribe, the Power and Authority to Establish all such Laws, Institutions, and Ordinances, and to Constitute such Courts and Officers, and to Make such Provisions and Regulations for the Proceedings in such Courts, and for the Administration of Justice, and for the Raising and Expenditure of the Public Revenue, as might be deemed necessary for the Peace. Order, and good Government of Our Subjects, and Others within Our said Settlements, or within any Territories which might at any time be part of, or Dependent upon, the same.

And Whereas by Our Order in Our Privy Council, bearing date the Twenty-eighth day of December, 1866, We did Declare that from and after the First day of April, 1867, the said Act of the Twenty-ninth and Thirtieth Year of Our Reign should come into Operation. Now Know you that by these Our Letters-Patent under the Great Seal of the United Kingdom aforesaid, We do Declare Our Pleasure to be as follows, That is to say:—

- I. We do by these Our Letters-Patent Delegate to the Persons within the said Straits Settlements, who shall from time to time compose the Legislative Council thereof, full Power and Authority to establish such Laws, Institutions, and Ordinances, and to constitute such Courts and Officers, and to make such Provisions and, Regulations as aforesaid; Subject always to all such Conditions, Provisoes, and Limitations, as by these or any other Our Letters-Patent under the Great Seal aforesaid, or by any such Instructions as aforesaid, are or may, from time to time, be prescribed.
- II. The said Legislative Council shall consist of the Governor of our said Settlements and of the following Persons; That is to say, of such Public Officers within Our said Settlements as shall be Designated, and such other Persons within the same as shall be Named for that purpose, by or in virtue of any Instruction or Instructions, or by any Warrant or Warrants to be by Us for

that purpose from time to time issued under Our Sign-Manual and Signet, and with the Advice of Our Privy Council, which Officers and Persons shall be called respectively the Official and Unofficial Members of Our Council, and of such other Persons as may from time to time be Provisionally Appointed as hereinafter mentioned, all of which Councillors shall hold their Places in the said Council at Our Pleasure.

- The Governor may by an Instrument under the Public Seal of the Settlements, or, until there shall be such a Seal, by Writing under his Hand, Appoint one or more Persons to act provisionally as Unofficial Councillor or Councillors in case at any time the Number of such Unofficial Councillors present in the Settlements, and capable of acting in the discharge of their duties. shall be less than Five. Every such Appointment may be Disallowed by Her Majesty, through One of Her Principal Secretaries of State, or may be Revoked by the Governor by such Instrument as aforesaid. And any such Appointment, or, as the case may be, the last in Date of such Appointments shall, ipso facto, expire whenever by its continuance the Number of Unofficial Councillors present in the Settlements, and capable of acting in discharge of their duties, would be raised above the Number of Five.
- IV. If any Councillor shall become Bankrupt or Insolvent, or shall be Convicted of any Criminal Offence, or shall absent himself from Our Settlements for more than Three Months without Leave from the Governor, the Governor may Declare in Writing that his Seat at the Council is Vacant, and immediately on the Publication of such Declaration he shall cease to be a Member of the Council.
- V. The Governor may by Writing under his Hand and Seal Suspend any Unofficial Covernor from the exercise of his Office, Subject always to such Instructions as he may from time to time receive from Us under Our Sign-Manual and Signet, or through one of Our Principal Secretaries of State respecting the Suspension of Public Officers.
- VI. Any Unofficial Councillor may Resign his Office by Writing under his Hand, but no such Resignation shall take effect until it be Accepted in Writing by the Governor, or by Us through one of Our Principal Secretaries of State.
- VII. The Official Members of Our Council shall take Precedence before the Unofficial Members in the Order in which they may be Named by Us in any Instruction or Instructions as aforesaid; and the Unofficial Members shall take Rank according to the Date of their Appointment, or, if appointed by the same In-

strument, according to the Order in which they are named therein: Provided that Public Officers or Unofficial Councillors appointed by Us shall respectively Rank before Public Officers or Unofficial Councillors Provisionally Appointed by our Governor of our said Settlements.

VIII. Our Governor, or in his Absence any Member of the Council Appointed by him in Writing, or in default of such Appointment the Member present who shall stand First in Order of Precedence, shall preside at every Meeting of the said Council.

IX. All Questions brought before the said Council shall be Decided by the Majority of the Votes given, and the Governor or Presiding Member shall have an Original Vote on all such Questions, and also a Casting Vote if the Votes shall be equally divided.

X. Until otherwise provided by the Council, no Business (except that of Adjournment) shall be transacted unless there shall be present Three Members of Council besides the Governor or Presiding Member.

XI. The Council shall, in the Transaction of Business and Passing of Laws, conform to such Instructions under Our Sign Manual and Signet as may from time to time be addressed to Our Governor in that behalf: And Subject to such Instructions, the Council may make Standing Rules and Orders for the Regulation of their own Proceedings.

XII. No Law shall take effect unless the Governor shall have Assented to the same on Our Behalf and shall have Signed the same in token of such Assent, nor until the same shall have been Published in the said Settlements by his Authority.

XIII. Any Law Disallowed by Us with the Advice of Our Privy Council, or through on of Our Principal Secretaries of State, shall become Null an Your said Settlements by Authority of the Governor.

XIV. In these Our Letters-Patent the Term "Governor" shall mean the Officer for the time being lawfully Administering the Government of the Straits Settlements.

XV. We do hereby Reserve to Ourselves, Our Heirs and Successors, full Power and Authority from time to time to Revoke, Alter, or Amend this Our Charter as to Us or Them shall seem meet.

In Witness, &c.

Westminster, 4th February, 1867.

(Signed) C. ROMILLY.

### List of the unrepealed Straits Settlements Ordinances, from the year 1867 to Ordinance VI of 1877.

| Abolition of imprisonment for debt, (Se     | ee Gov. Gaz. for  |                                       |
|---------------------------------------------|-------------------|---------------------------------------|
| Rules dated 31st December, 1870)            | •••               | XXII of 1870.                         |
| Aliens holding and transferring property    | ***               | XIII of 1875.                         |
| Aliens, naturalization of                   |                   | VIII of 1867.                         |
| ,, (Amendment)                              | ***               | VII of 1870.                          |
| Appeals, (repealed Ord, XXVII of 1867)      |                   | 1X of 1874.                           |
| Appointment of public officers              |                   | I of 1867.                            |
| Arms, exportation of                        | ***               | XI1I "                                |
| † ,, and ammunition, sale of, (Special, in  |                   |                                       |
| if prohibited to be notified in a Pr        | oclamation)       | XI of 1875.                           |
| Bankruptcy, (See Gov. Gaz. for Rules da     | ated 31st Decem-  | 1                                     |
| ber, 1870)                                  | ***               | XXI of 1870.                          |
| Births and deaths, registration             |                   | XVIII of 1868.                        |
| Cattle contagious disease                   | ***               | XXV of 1867.                          |
| Census for 1871, (Special)                  |                   | XI of 1870.                           |
| Coin, silver and copper                     | ***               | IV of 1867.                           |
| Commissions of Inquiry, appointments b      |                   | •VIII of 1876.                        |
| Contagious diseases, (certain ss. amended   |                   | · · · · · · · · · · · · · · · · · · · |
|                                             | by 111 01 10.0    | TTTTTT 8 2000                         |
| and VIII of 1875)                           | •••               | XXIII of 1870.                        |
| ,, ,, (Amendment.)                          | ***               | III of 1873.                          |
| ,, ,, ,, ,, ,, ,,, ,,,,,,,,,,,,,,,,,,,,     | ***               | VIII of 1875.                         |
| Convicts undergoing sentences of transp     | ortation          | IV of 1872.                           |
| Coroners' Inquests                          |                   | II of 1868.                           |
| Court suitors' deposits                     |                   | IX of 1867.                           |
| ,, ,, interest on                           |                   | XXIII ,,                              |
| ,, ,, transfer of                           |                   | VII of 1873.                          |
| Courts, Supreme, (ss. 5 to 28, 37 to 43 h   |                   | W -6 1000                             |
| pealed by V of 1873)                        |                   | V of 1868.                            |
| ,, (ss. 59 and 69 repeale                   |                   | V of 1873.                            |
| * ,, (repealed V of 1874,                   |                   |                                       |
| and 93 of V of 1873;—&                      |                   | XVII of 1876.                         |
| 51 of V of 1873)                            | ***               | XX of 1870.                           |
| Criminal justice                            | lad by any Ord —  | AA 01 1010.                           |
| ,, Procedure,—(this Ord. is not repeated    | neu by any oru;   |                                       |
| Sec. 53 of this Ord.<br>Penal Code of 1870; | repeated sec. 014 |                                       |
| 1871 repealed Penal                         | Code of 1870)     | V of 1870.                            |
|                                             |                   | VI of 1873.                           |
| Crimping                                    |                   | III of 1877.                          |
| Crown rents, recovery of,                   | ***               | V of 1869.                            |
| ,, suits, ,, debts & claims, (r             | pld. XIX of 1870) | XV of 1876.                           |
| Dangerous Societies, (made perpetual by V   | of 1872.)         | XIX of 1869.                          |
|                                             |                   |                                       |

<sup>\*</sup> It abolished the Courts of Quarter Sessions—gave power instead to two or more Magistrates. It also re-established the Courts of Requests at Penang and Singapore.

<sup>†</sup> This is inserted because it is often supposed that it is in force.

S.L.

| Dangerous Societies, (to make perpetual XIX of 1869)   Distress for rent, (repealed ss. 2 to 8 and 29 of Indian (Court of Requests) Act XXIX of 1866; and paras 3 & 4 of s. 3, of Ord, V, of 1874)   XIV of 1876.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                           |               |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------|---------------|
| Distress for ront. (repealed ss. 2 to 8 and 29 of Indian (Court of Requests) Act XXIX of 1866; and paras 3 & 4 of s. 3, of Ord. V. of 1874)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | Dangerous Societies, (to make perpetual XIX of 1869)                      | V of 1872.    |
| Court of Requests) Act XXIX of 1866; and paras 3 & 4 of s, 3, of Ord, V, of 1874)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                           |               |
| 3 & 4 of s. 3, of Ord. V, of 1874                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | (Court of Requests) Act XXIX of 1866; and paras                           |               |
| Distressed Seamen                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | D 8 4 C O C O 4 TT O TOTAL                                                | XIV of 1876.  |
| Electric telegraph, exclusive privileges                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Distragged Commen                                                         |               |
| Enabling Act, Government                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                           |               |
| Exchange Act, postage                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                           |               |
| Excise, (s. 94 repealed by Ord. XV of 1871)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                           | ******        |
| Excise, (s. 94 repealed by Ord. XV of 1871) IV of 1870.  "(Amendment—repealed Ord. III of 1871) XV of 1871.  Exportation of Arms XV of 1871.  Exportation of Arms XVII of 1867.  * Extradition, (to form part of Imperial Extradition Acts, 1870 and 1873) IV of 1877.  "Indian Acts VII of 1854 and I of 1849.  Fees for survey of vessels employed as passenger ships IV of 1868.  "It of 1869.  Fire, protection of Towns from IV of 1868.  "Foreign seamen, jurisdiction III of 1869.  Foreign seamen, jurisdiction IV of 1873.  "Foreign seamen, jurisdiction IV of 1873.  "Foreign seamen, jurisdiction IV of 1875.  Gaming Houses, (repealed Ord. XIII of 1870) IX of 1876.  Governor's salary and Government House furniture IV of 1873.  Government Enabling Act III of 1867.  "Gunpowder & other explosive substances VIII of 1868.  Hackney carriage, (s. 12 repealed by Ord. XXVII of 1870) XXVII of 1870.  Harbours and ports, (s. 27 repealed by III of 1876.) XXVII of 1870.  Harbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872.  "Interpretation Act, (ss. 3, 10, 11, & 19, & d. 1 to 3 of s. 21 repealed by I of 1868) XXII of 1867.  Interpretation Ordinance, (Amendment) XIV Interpretation Ordinance, (Amendment) XIV Interpretation Ordinance, (repealed Ord. X of 1873) II of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1876.  XXII of 1875.  For Emigration from Madras, See Indian Act, in Govt, Gaz. of July 20, 1877) (to enforce I of 1876.) XII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) VIII of 1870.  Lands, Malacca, (to amend Act XXVI of 1881) XII of 1876. | ,, treasury                                                               |               |
| (Amendment—repealed Ord. III of 1871)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Excise, (s. 94 repealed by Ord. XV of 1871)                               | IV of 1870.   |
| * Extradition, (to form part of Imperial Extradition Acts,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                           | XV of 1871.   |
| 1870 and 1873   Indian Acts VII of 1854 and I of 1849                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Exportation of Arms                                                       | XIII of 1867. |
| Indian Acts VII of 1854 and I of 1849.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | * Extradition, (to form part of Imperial Extradition Acts,                |               |
| Fees for survey of vessels employed as passenger ships     IV of 1868.     for services under the Imperial Merchant Shipping Act   III of 1869.   Fire, protection of Towns from         I of 1873,       I of 1873,       I of 1875.     III of 1875.   Gaming Houses, (repealed Ord. XIII of 1870)     IX of 1876.   Governor's salary and Government House furniture     IV of 1873.   Government Enabling Act         II of 1873.   Government Enabling Act         II of 1875.       II of 1875.       II of 1876.         II of 1867.           II of 1868.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                           | IV of 1877.   |
| Fire, protection of Towns from                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                           |               |
| Fire, protection of Towns from I of 1873,  Foreign seamen, jurisdiction I of 1873,  ,, recruiting prohibited                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                           |               |
| Foreign seamen, jurisdiction I of 1873, , recruiting prohibited III of 1875.  Gaming Houses, (repealed Ord. XIII of 1870) IX of 1876.  Governor's salary and Government House furniture IV of 1873.  Government Enabling Act III of 1867. , Officers Appointment III of 1867. , Officers Appointment III of 1868.  Hackney carriage, (s. 12 repealed by Ord. XXVII of 1870) XIX of 1867. , (Amendment) XXVII of 1870.  Harbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872. , (Amendment) III of 1876.  Indemnity Act, Penang riot, (Special) XXII of 1867.  Interpretation Act, (ss. 3, 10, 11, & 19, & cl. 1 to 3 of s. 21 repealed by I of 1868) XIV  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XIII of 1867.  Inventors, granting exclusive privileges to XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  Native labourers from India,—(repealed Ord XII of 1877.  Native labourers from India,—(repealed Ord XII of 1876.  XVI, of 1839) VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI of 1839) II of 1871.  **See Order of the Queen in Council, 11th July 1877, confirming it in Gov. Gas. 7th Bept-1877.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                           |               |
| Gaming Houses, (repealed Ord. XIII of 1870) IX of 1876.  Governor's salary and Government House furniture IV of 1873.  Government Enabling Act III of 1867.  , Officers Appointment III of 1867.  , Officers Appointment VIII of 1868.  Hackney carriage, (s. 12 repealed by Ord. XXVII of 1870) XIX of 1867.  , (Amendment) XXVII of 1870.  Harbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872.  , (Amendment) XXIII of 1872.  Indemnity Act, Penang riot, (Special) XXII of 1867.  Interpretation Act, (ss. 3, 10, 11, & 19, & cl. 1 to 3 of s. 21 repealed by I of 1868) XIV  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XIII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  Native labourers from India,—(repealed Ord. XIII of 1877.  Native labourers from India,—(repealed Ord. XIII of 1877.  Native labourers from India,—(repealed Ord. XIII of 1877.  Juries Exemption Ordinance XIII  Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI of 1839) II of 1871.  Land, Malacca, (to amend Act XXVI of 1861) XI of 1875.  *See Order of the Queen in Council, 11th July 1877, confirming it in Gov. Gaz. 7th Sept-1877.                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | •                                                                         | ,,            |
| Gaming Houses, (repealed Ord. XIII of 1870) IX of 1876.  Governor's salary and Government House furniture IV of 1873.  Government Enabling Act II of 1867.  " Officers Appointment II of 1867. " Officers Appointment II .,  Gunpowder & other explosive substances VIII of 1868.  Hackney carriage, (s. 12 repealed by Ord. XXVII of 1870) XIX of 1867.  " , , (Amendment) XXVII of 1870.  Harbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872. " , , , , (Amendment) III of 1876.  Indemnity Act, Penang riot, (Special) XXII of 1867.  Interpretation Act, (ss. 3, 10, 11, & 19, & cl. 1 to 3 of s. 21 repealed by I of 1868) XXII of 1867.  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XIII of 1867.  Inventors, granting exclusive privileges to XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  " Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt, Gaz. of July 20, 1877) I of 1876.  XII of 1876.  Land Act, registration of deeds, (to amend Indian Act XVI of 1839) VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI of 1839) II of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1875.                                                                                                                                                                                                                                                                                                                                                                                           |                                                                           |               |
| Governor's salary and Government House furniture IV of 1873.  Government Enabling Act II of 1867.  , Officers Appointment II of 1867.  , Gunpowder & other explosive substances VIII of 1868.  Hackney carriage, (s. 12 repealed by Ord. XXVII of 1870) XIX of 1867.  , (Amendment) XXVII of 1870.  Harbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872.  , , , , (Amendment) III of 1876.  Indemnity Act, Penang riot, (Special) XXII of 1867.  Interpretation Act, (ss. 3, 10, 11, & 19, & cl. 1 to 3 of s. 21 repealed by I of 1868) XIV  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XIV  Inwingration, Chinese, (repealed Ord. X of 1873) II of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  , Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt, Gaz. of July 20, 1877) I of 1876.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                           |               |
| Government Enabling Act                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                           |               |
| Gunpowder & other explosive substances VIII of 1868.  Hackney carriage, (s. 12 repealed by Ord. XXVII of 1870)  Marbours and ports, (s. 27 repealed by III of 1876.) XXVII of 1870.  Harbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872.  Marbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872.  Marbours and ports, (s. 27 repealed by III of 1876.) III of 1876.  Indemnity Act, Penang riot, (Special) XXII of 1867.  Interpretation Act, (ss. 3, 10, 11, & 19, & cl. 1 to 3 of s. 21 repealed by I of 1868) XIV  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XXIII of 1867.  Inventors, granting exclusive privileges to XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt. Gaz. of July 20, 1877) I of 1876.  Juries Exemption Ordinance XII VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  """, of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  *See Order of the Queen in Council, 11th July 1877, confirming it in Qov Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                          | Governor's salary and Government House furniture                          |               |
| Gunpowder & other explosive substances VIII of 1868.  Hackney carriage, (s. 12 repealed by Ord. XXVII of 1870) XIX of 1867.  ", " (Amendment) XXVII of 1870.  Harbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872.  ", ", " (Amendment) III of 1876.  Indemnity Act, Penang riot, (Special) XXII of 1867.  Interpretation Act, (ss. 3, 10, 11, & 19, & cl. 1 to 3 of s. 21 repealed by I of 1868) XIV  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XXIII of 1867.  Inventors, granting exclusive privileges to XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  " Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt. Gaz. of July 20, 1877) I of 1876.  " (to enforce I of 1876.) XII VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  " " of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Gov Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 9                                                                         | 1             |
| Hackney carriage, (s. 12 repealed by Ord. XXVII of 1870)  ,, ,, (Amendment) XXVII of 1870.  Harbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872.  ,, ,, (Amendment) III of 1876.  Indemnity Act, Penang riot, (Special) XXII of 1867.  Interpretation Act, (ss. 3, 10, 11, & 19, & cl. 1 to 3 of s. 21 repealed by I of 1868) XIV  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XXIII of 1867.  Inventors, granting exclusive privileges to XIII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  ,, Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt, Gaz. of July 20, 1877) I of 1876.  y, (to enforce I of 1876.) XII XII YIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  y, ,, of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Qov Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | • • • • • • • • • • • • • • • • • • •                                     | "             |
| Marbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                           | •             |
| Harbours and ports, (s. 27 repealed by III of 1876.) VIII of 1872.  ", ", (Amendment) III of 1876.  Indemnity Act, Penang riot, (Special) XXII of 1867.  Interpretation Act, (ss. 3, 10, 11, & 19, & cl. 1 to 3 of s. 21 repealed by I of 1868) XIV  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XXIII of 1867.  Inventors, granting exclusive privileges to XIII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  "Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt, Gaz. of July 20, 1877) I of 1876.  "(to enforce I of 1876.) XII VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  ", ", of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Qov Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | · · · · · · · · · · · · · · · · · · ·                                     |               |
| Indemnity Act, Penang riot, (Special)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                           |               |
| Indemnity Act, Penang riot, (Special)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                           |               |
| Interpretation Act, (ss. 3, 10, 11, & 19, & cl. 1 to 3 of s. 21 repealed by I of 1868) XIV  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XXIII of 1867.  Inventors, granting exclusive privileges to XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  "Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt. Gaz. of July 20, 1877) I of 1876.  "(to enforce I of 1876.) XII , VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  ", of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Qov. Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                           |               |
| pealed by I of 1868) XIV  Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XXIII of 1867.  Inventors, granting exclusive privileges to XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  "Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt. Gaz. of July 20, 1877) I of 1876.  "(to enforce I of 1876.) XII ,  Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  ", of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Qov. Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                           | XXII of 1867. |
| Interpretation Ordinance, (Amendment) I of 1868.  Interest on suitors deposits XXIII of 1867.  Inventors, granting exclusive privileges to XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  "Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt. Gaz. of July 20, 1877) I of 1876.  "(to enforce I of 1876.) XII ,  Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  ", of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Qov. Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                           | VIV           |
| Interest on suitors deposits XXIII of 1867.  Inventors, granting exclusive privileges to XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  "Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt. Gaz. of July 20, 1877) I of 1876.  "(to enforce I of 1876.) XII "  Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  ", of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Qov. Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                           | ,,,           |
| Inventors, granting exclusive privileges to XII of 1871.  Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  "Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt. Gaz. of July 20, 1877) I of 1876.  "(to enforce I of 1876.) XII "  Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  ", of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Gov. Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                           |               |
| Immigration, Chinese, (repealed Ord. X of 1873) II of 1877.  "Native labourers from India,—(repealed Ord. IX of 1875. For Emigration from Madras, See Indian Act, in Govt. Gaz. of July 20, 1877) I of 1876.  "(to enforce I of 1876.) XII "  Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  ", of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Gov. Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                           |               |
| IX of 1875. For Emigration from Madras, See Indian Act, in Govt, Gaz. of July 20, 1877)  I of 1876.  (to enforce I of 1876.) XII ,,  Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  ,, of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Qov. Gaz. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                           | II of 1877.   |
| See Indian Act, in Govt. Gaz. of July 20, 1877)  (to enforce I of 1876.) XII ,,  Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | ,, Native labourers from India,—(repealed Ord.                            |               |
| ,, (to enforce I of 1876.) XII ,,  Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                           |               |
| Juries Exemption Ordinance VIII of 1870.  Land Act, registration of deeds, (to amend Indian Act                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                           |               |
| Land Act, registration of deeds, (to amend Indian Act XVI, of 1839) II of 1871.  "", of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Qov. Gas. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                           |               |
| XVI, of 1839) II of 1871.  "", of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Gov. Gas. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                           | ATTT OF 1910. |
| ,, ,, ,, of mutations of titles to land, (to amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Gov. Gas. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                           | II of 1871.   |
| amend Indian Act XVI of 1839) V of 1875.  Lands, Malacca, (to amend Act XXVI of 1861) XI of 1876.  * See Order of the Queen in Council, 11th July 1877, confirming it in Gov. Gas. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                           | 01 10/11      |
| * See Order of the Queen in Council, 11th July 1877, confirming it in Gov. Gas. 7th Sept-1877                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | amend Indian Act XVI of 1839)                                             | V of 1875.    |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                           |               |
| p. 920. S.L.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | * See Order of the Queen in Council, 11th July 1877, confirming it in Gov |               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | p. 020.                                                                   | S.L.          |

| Legal Tender Act                                                      |          |            |        | 137          | of 1867  |
|-----------------------------------------------------------------------|----------|------------|--------|--------------|----------|
| Loan, Straits Settlements                                             | • •      | ••         | ••     |              | of 1877  |
| Locomotives on public thoroughfares                                   | ••       | ••         | ••     |              | of 1871: |
| Malacca Lands                                                         |          | ••         | ••     |              |          |
| W 1 0 1 0 1                                                           | • •      | ••         | ••     |              | of 1876. |
| _ *                                                                   | • •      |            | ••     |              | of 1870. |
| Members of Council exempted from s<br>Merchant Seamen Act, (to extend |          |            |        | VIII         | ,,       |
| men's Act I of 1859 to shi                                            |          |            |        | 777777       | -£ 1007  |
| Money Order                                                           | ps or t  | ne Colony  | ,      | IIIVXX       | of 1870  |
| Municipal, (to amend Ind. Act XXV)                                    | II of 18 | 356)       | ••     |              | of 1875  |
| ,, Indian Acts, viz; XIV of                                           |          |            | 1856.  |              | 01 1010  |
| XXVII of 1856 and XVI                                                 |          |            | ,      |              |          |
| Naval and Victualling Stores                                          |          |            |        | $\mathbf{x}$ | of 1867  |
| Native Passenger Ships                                                |          |            | • •,   |              | of 1870  |
| Naturalization of Aliens                                              |          | **         |        | VIII         | of 1867  |
| ,, ,, ,, (Amendment                                                   | )        | ••         |        | V1I          | of 1870  |
| Oaths, promissory                                                     |          |            | ••     | XI           | of 1869  |
| Passenger ships, regulation of                                        | • •      | • •        | • •    | XXXI         | of 1867. |
| ,, ,, fees for survey of                                              | • •      | ••         | • •    | IV           | of 1868  |
| ,, Chinese, (ss. 9 & 10                                               | repeal   | ed by Or   | d. VI  |              |          |
| of 1874)                                                              | ••       | ••         | ••     | XIV          | **       |
| ,, ,, Native, (to amend                                               | India    | a Act X    | XI of  |              |          |
| 1858.)                                                                |          |            | ••     | VI           | of 1870. |
| ,, ,, (repealed ss. 10 &                                              |          |            |        |              |          |
| of 1858,—s. 2 of                                                      |          |            |        |              |          |
| 1859,—& ss. 9 &                                                       | 10 of    | Ord. X     | V of   |              |          |
| 1868.)                                                                |          |            | - :    | VI           | of 1874. |
| " Steamers, survey of Britisl                                         | h, (to 1 | oe read as | part   |              |          |
| of Chinese Passenger Sh                                               |          |            | 1868   |              |          |
| and Ind. Acts 21 of 1858 &                                            |          | f 1859)    | • •    | IX           | of 1871. |
| Pawnbrokers, (repealed Ord. VII of                                    | 1871)    |            | • •    | , VII        | of 1872. |
| Penal Code                                                            | • •      |            | ••     | IV           | of 1871. |
| " " (Amendment)                                                       |          | • •        |        | III          | of 1872. |
| Penang Riots Enquiry Act, (Special)                                   | ••       |            | • •    | XXI          | of 1867. |
| " Indemnity Act. ( " )                                                |          | • •        | ••     | XXII         | ,,       |
| Pensions, whole repealed by I of 13                                   | 871 exc  | ept ss. 21 | and 22 | IX           | of 1870. |
| ,,                                                                    | ••       | ••         | ••     |              | of 1871. |
| Pilots and Pilotage                                                   |          | ••         | ••     |              | of 1868. |
| " (Amendment)                                                         | • •      | ••         | ••     |              | of 1869. |
| Police Force                                                          | ••       | ** -/,     |        |              | of 1872. |
| Postage Exchange                                                      |          | *          |        | XVII         | of 1867. |
| Ports and Harbours, (repealed Ind. A                                  |          |            | t Sec. | *****        |          |
| 3 of Ind. Act 41 of 1850                                              | )        | ••         | /**    | VIII         | of 1872. |
| • See the one published by me, complete.                              |          |            | ,      |              | 8.L.     |

|                                         |            |                                       |           | /                |                                         | Y .            |
|-----------------------------------------|------------|---------------------------------------|-----------|------------------|-----------------------------------------|----------------|
| * Preservation of the P                 | Peace, (p  | erpetual)                             |           |                  |                                         | VI of 1872.    |
| 11 11                                   | (re        | pealed s.                             | 15 of V   | I of 1872;       |                                         | V of 1877.     |
| Presbyterian Church                     |            |                                       |           | • •              |                                         | II of 1876     |
| Prisons                                 | • •        |                                       |           |                  | • • •                                   | XIV of 1872,   |
| Procedure-See Crimin                    | al Proce   | edure                                 |           |                  | ,                                       |                |
| Promissory Oaths                        |            |                                       |           |                  | • •                                     | XI of 1869.    |
| Prye Bridge and tolls.                  | Province   | Wellesle                              | y, (In    | suspense)        |                                         | IV of 1875.    |
| Public Officers' appoint                |            |                                       | •••       | ••               |                                         | 1 of 1867.     |
| ., Seal                                 | ••         |                                       | 4,+       |                  | ••                                      | IX of 1868.    |
| Quarantine, prevention                  | of the s   | pread of                              | contagio  | ous diseas       | 88                                      | VII of 1868.   |
| Recruiting for foreign                  |            |                                       | , ,       |                  |                                         | III of 1875.   |
| Riots Enquiry Act, Pir                  |            | negial)                               | ••        |                  |                                         | XXI of 1867.   |
| Savings Banks                           | 8, (1      | , , , , , , , , , , , , , , , , , , , |           |                  | • •                                     | VI of 1876.    |
| Seal—See Public Seal                    |            | • •                                   | ••        | • • •            |                                         | , = 01 = 0, 0, |
| Stamps, (B. of Exchar                   | nge &c. f  | from Ind                              | ia befo   | re and at        | fter                                    |                |
|                                         |            |                                       |           |                  |                                         | VI of 1867.    |
| " (Schedule B r                         | epealed l  | by I of 18                            | 375.)     | ••               |                                         | VIII of 1873.  |
| ,, (Amendment)                          |            | ••                                    |           | • •              |                                         | I of 1875.     |
| State Prisoners, arrest                 | and dete   | ention of                             | • •       | ••               |                                         | IV of 1876.    |
| ,, ,, safe d                            | letention  | of Ex                                 | Sultan    | <b>Ab</b> dullah | at                                      |                |
| Singap                                  | ore        |                                       |           | ••               |                                         | VI of 1877.    |
| Steam Vessels, (repeal                  | ed S. V.   | Ord. of 1                             | 1872, ar  | d Secs. 2        | l to                                    |                |
| 26 of Indian Ac                         |            |                                       |           |                  |                                         | IX of 1873.    |
| ,, Boilers, inspecti                    | on of, (to | be read                               | as part c | f Indian I       | Mu-                                     | -              |
| nicipal Act XIV                         |            |                                       |           |                  |                                         | X of 1876.     |
| Stores, Naval and Vict                  |            |                                       |           |                  |                                         | X of 1867.     |
| Summary Jurisdiction,                   | _          | of s. 19.                             | repealed  |                  |                                         | •              |
| , , , , , , , , , , , , , , , , , , , , | of 1873    |                                       |           | 1                |                                         | XIII of 1872.  |
|                                         |            | lment)                                | ••        | *                |                                         | II of 1873.    |
| Supreme Court—See C                     | -          | ,,                                    | •••       | *-               |                                         |                |
| Survey of vessels, fees                 |            |                                       |           |                  | ••                                      | IV of 1868.    |
| Telegraph exclusive pr                  |            |                                       | ••        | ••               | •••                                     | XIV of 1870.   |
| Transfer of Court Suit                  |            |                                       | •         | •••              | ••                                      | VII of 1873.   |
| Treasonable offences,-                  | -          |                                       | led by I  |                  |                                         | VI of 1868.    |
| ,, ,,                                   | (Amen      |                                       |           | . ,              |                                         | I of 1869.     |
| Treasury Exchange Ac                    | •          |                                       |           |                  |                                         | V of 1867.     |
| Vaccination                             | •••        | ••                                    |           | • • •            | • • • • • • • • • • • • • • • • • • • • | XIX of 1868.   |
| Volunteer Corps                         | ••         | ••                                    | ••        | ••               | ••                                      | XV of 1869.    |
| Water Rate, Penang                      | ••         |                                       |           | ••               |                                         | XX of 1868.    |
| Witnesses expenses                      |            | ••                                    |           | ••               | • •                                     | XVII of 1870.  |
| 11 AULUDBOD CAPCIDOS                    |            |                                       |           |                  |                                         |                |

<sup>\*</sup> Norg.—The first Preservation of the Peace Ord. was XX of 1867, it was passed with a provision that it was to continue in force for 1 year (to 8th August 1868), it was afterwards extend. ed to 30th June 1870, with certain amendments, by VII of 1869,—this Ord. repealed X of 1868 which extended XX of 1867 to another year. Ord IX of 1869 was passed and taken to be read as part of VII of 1869. At the end of June 1870, Ord. XX of 1867 ceased to be in force and was not renewed by another Ord; III of 1870 was next passed and was to continue in force for 3 years from 30th June 1870 but before the time expired Ord. VI of 1872 was passed and made perpetual. Ord V of 1877 was next passed to amend Sec. 15 of VI of 1873.

The Hon'ble Thomas Braddell, Attorney General, Straits Settlements, has kindly favoured me with the following, information, concerning an Imperial Act for improving the Administration of Criminal Justice in the East Indies, passed on 25th July 1828.

"The Indian Criminal Act, 9 Geo. IV c. 74, generally known as Wynn's "Act, is almost entirely superseded by the Penal Code and certain Ordi-

- "nances for Procedure, but there are a few Sections of the Act which being of Imperial effect, it is supposed, will remain in force. Certain sections
- "of the Act are made applicable to offences under the Penal Code by Section
- "38 of Ordinance V of 1870, \* but these Sections have since been superseded by the Ordinance VI of 1873, \*"

"The whole Act has been repealed as to India by the Indian Act X of 1873 except the 7 Sections above referred to which are here given—

"here Sections 1, 7, 8, 9, 25, 26 and 56, of 9 Geo. IV c. 74."

S.L.

25th September, 1877.

\* Criminal Procedure Ordinance.

## ADDITIONAL TO LIST.

Ordinances of 1877 passed since the List was printed.

#### Omission in page 605.

Debtors Ordinance, (repealed Sec. 35 of the Sup. Court Ord.
V of 1868; Sec. 13 of Indian Act XXIX of 1866; and
the first 8 Secs. of Act VII of 1855—the remainder
of the last mentioned Act shall be read with and as
applying to this Ord.)

XXII of 1870.

Date of Proclamations when each of the Settlements came under the provisions of the Peace Preservation Ordinance VI of 1872. These orders will remain in force until cancelled—see Sec. 7.

SINGAPORE, 24th December 1872, Vide Gov. Gaz, 3rd January 1873, p. 7.

Malacca, 29th September 1876, Vide Gov. Gaz, 29th September 1876, p. 657. Penang, 22nd June 1877,

Vide Gov. Gaz, 22nd June 1877, p. 383.

#### Correction.

Page 606, line 12, for "XVII of 1868" read "XVII of 1863."

In the Preface, at page 3, line 6. for "Judge" read "Judge of the Straits Settlements." the style in which the 2nd and 3rd Judges of the Straits are gazetted. The Ordinance No. XVII of 1876, Section 2, enacted a law as follows:—

"The present Senior Puisne Judge shall, be a Judge of the Supreme Court under the provisions of this Ordinance, but shall otherwise hold his office as heretofore."

"All the powers, duties, authorities, and jurisdiction conferred on the Supreme Court, and on any of its Judges, may be exercised and performed by
any Judge of the Court at any Settlement where he may be in the execution
of the duties of his office."



Extract from a Minute by the Attorney General on the subject of Masters and Servants Ordinance.

Penang Gazette, 18th October, 1877.

"At the time the Penang Association made their representation, the law relating to crimping and enticing labourers from their employers was confined to Indian Immigrants and did not include labourers generally; since that time the Crimping Ordinance III of 1877 by Section 13 has been passed providing fully on this point as to all labourers in Stores, Docks, Wharves, Factories, Workshorps and husbandry, leaving the Indian Immigrants as enacted in the Immigration Ordinance 1 of 1876. The Indian Act XIII of 1859 extended to Province Wellesley, see Straits Government Gazette for 1860, page 53 (the Act can be extended to Penang if desired). In it provision is made for breaches of contract by artificers, workmen and labourers, who have received advances for their work, that the Magistrate may order (at the option of the employer) the labourer. &c., to fulfil the terms of his contract or return the advance, and in default, may sentence the offender to three months' imprisonment with hard labour."

"Sections 490, 491, and 492 of the Penal Code provide penalties for breaches of contract for personal service under certain circumstances, (1) during a voyage, (2) helpless persons, and (3) service at a distant place to which the servant is conveyed at the Master's expence. The English Masters and Servants Act, Act 4 of George IV chapter 34, was held to be in force in this Colony by Sir Benson Maxwell in 1859. I believe the Act has been in use ever since; but am not sure of this." (See Reg. vs. Willans, p. 66. S.L.)

"These are the laws in force as to Masters and Servants, and they appear to me to be sufficient as far as ordinary labourers are concerned. We have no law dealing summarily with domestic servants. The subject has been frequently brought to the notice of the Indian Government, but that Government has steadily refused to legislate on this subject."

Gov. Gaz. 9th March, 1860, p. 54.
NOTIFICATION—No. 35.

The following is substituted for Notification No. 21 of 4th February 1860, published in the Gazette of 24th idem.

It is hereby notified for general information that with reference to Act 13 of 1859 the Station of Penang includes the whole of Province Wellesley in the Settlement of Prince of Wales' Island, and that the Police Magistrate of the said Province has power to try all cases coming under the provisions of the said Act.

By Order,

J. Burn,-Captain,

Secretary to the Governor of the Straits Settlements.

Penang, 2nd March, 1860.

#### 26th October, 1877,

ENGLISH MASTERS AND SERVANTS ACT.

At a Meeting of the Legislative Council held at Singapore, Mr. WALTER Scott, the member for Penang, put the following question:—

- "Whether or not the English Master and Servant Act (Act IV of Geo. IV),
- " is in force in the Colony as held by Sir Benson Maxwell in 1859, as the
- "Magistrates in Penang do not appear to recognise it, and the Hon'ble the
- "Attorney-General gives an undecided opinion in his minute of the 12th
- " May 1877, on the question of a Master and Servant Ordinance for these
- " Settlements."

THE ATTORNEY-GENERAL replied .- "Sir, I find on reference to the revised edition of the Statutes published in 1874, that the English Act relating to Masters and Servants, Act 4, George IV, chapter 34, which I presume is the Act referred to, is printed in the Vol. V, as an Act in force, this column of the Statutes dates from 1874, and the Act is set out in Index published in December 1874 as being in force at the time, but repealed as to Ireland, from which it is to be inferred that it is still in force in England, unless repealed since the 1st of December 1874. The Act is not mentioned in the edition of Statutes for 1875 or 1876; the edition for 1877 is not out yet. I may add that I remember having read a discussion in Parliament regarding prosecutions for offences under the Masters and Servants Act, and it was objected that such offences should be treated criminally but merely as civil wrongs for which a civil action lies. When I wrote the minute referred to by the honorable member I had the idea that the Act IV of George IV, chapter 34, had ceased to be in use in the Colony, having been practically superseded by the Indian Act No. 13 of 1859. The decision of Sir Benson Maxwell in the case of the Queen vs. Willans is sufficient authority for holding that the Act was in force in 1858, and. unless it has been repealed in England during the (also see page I25. S.L.) present year, it is in force now."

#### GOVERNMENT NOTIFICATION.

No. 188.

The following is published for general information.

By His Excellency's Command.

J. W. W. BIRCH,

Colonial Secretary,

Colonial Secretary's Office, Singapore, 11th September, 1874,

#### CIRCULAR.

DOWNING STREET,

11th July, 1874.

-Sir,—I have the honor to transmit a Copy of an Act, 37 and 38 Victoria, cap. 27, which has passed this Session, intituled "An "Act to regulate the sentences imposed by Colonial Courts where "jurisdiction to try is conferred by Imperial Acts."

- 2. As you are aware jurisdiction is given by certain Imperial Acts, as, for instance, 9 George 4, cap. 83, section 4, and 12 and 13 Victoria, cap. 96, to Colonial Courts to try offences committed beyond the jurisdiction of those Courts, and the persons convicted are made liable to suffer such punishment as by any law or laws in force at the time of the passing of such Acts, they would have been liable to if the offence had been committed and tried in England.
- 3. Difficulties have recently arisen, both in Victoria and Malta, in deciding what sentences could be passed upon persons tried and convicted in the Colonial Courts for offences committed out of the Colonies, but made triable within them by Imperial Acts; and the Act now transmitted has been passed with a view to prevent any such questions arising for the future.
- 4. The Act provides that such punishment may be inflicted in such cases as might have been inflicted if the offences had been committed within the Colony.
- 5. The Act also includes cases, if any, where offences, is committed within the local jurisdiction of a Colonial Court, are by Imperial Act made punishable according to the Law of England.
- 6. Moreover, special provision is made at the end of the third section to meet the case of an offence not punishable by the Law of the Colony in which the trial takes place; and the Colonial Court is in such case empowered to impose such punishment (other than capital punishment) as shall seem to the Court most

nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England.

- 7. These cases will, probably, be of rare occurrence; but it was thought desirable to embrace all possible cases, and to make the legislation upon the subject final and complete.
- 8. The usual steps should be taken to make the provisions of this Act known in the Colony under your Government.

I have, &c., (Signed) CARNARVON.

The Officer Administering

the Government of the

Straits Settlements.

(37 and 38 Vict.) Court's (Colonial) Jurisdiction (Ch. 27).

Chapter 27.

An Act to regulate the Sentences imposed by Colonial Courts where jurisdiction to try is conferred by Imperial Acts.

[30th June, 1874.]

Whereas by certain Acts of Parliament jurisdiction is conferred on Courts in Her Majesty's Colonies to try persons charged with certain crimes or offences, and doubts have arisen as to the proper sentences to be imposed upon conviction of such persons; and it is expedient to remove such doubts:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

- 1. This Act may be cited for all purposes as the Courts short title. (Colonial) Jurisdiction Act, 1874.
- 2. For the purposes of this Act, the term "Colony" shall not include any places within the United Kingdom, the Isle of Man, or the Channel Islands, but shall include such territories as may for the time being be vested in Her Majesty by virtue of an Act of Parliament for the Government of India, and any plantation, territory, or settlement situate elsewhere within Her Majesty's dominions, and subject to the same local government; and for the purposes of this Act, all plantations, territories, and settlements

under a central legislature shall be deemed to be one Colony under the same local government.

3. When, by virtue of any Act of Parliament now or hereafter

At trials in any Colonial Courts by virtue of Imperial Acts, Courts empowered to pass sentences as if crimes had been committed, in the Colony. to be passed, a person is tried in a Court of any Colony for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such Colony and of the local jurisdiction of such Court, or if committed within such local jurisdiction

made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such Colony and of the local jurisdiction of the Court, and to no other, anything in any Act to the contrary notwithstanding. Provided always, that if the crime or offence is a crime or offence not punishable by the law of the Colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the Court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England.

#### GOVERNMENT NOTIFICATION.

No. 227.

THE following Act of Parliament, passed on the 30th July, 1874, is published for general information.

By His Excellency's Command,

T. BRADDELL,
Acting Colonial Secretary.

Colonial Secretary's Office, Singapore, 19th October, 1874.

### CHAPTER 38.

An Act to extend the Jurisdiction of Courts of the Colony of the Straits Settlements to certain Crimes and Offences committed out of the Colony.

[30th July, 1874.]

Whereas crimes and offences have been and are committed against the persons and property of the inhabitants and others in territories in the neighbourhood of the Colony of the Straits Settlements by subjects of Her Majesty and by others resident in the said Colony at the time or within a short time before the commission of such crimes and offences, and it is expedient to provide for

the trial and punishment of such persons, when found in the said Colony, for such crimes and offences:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Crimes and offences committed out of the said Colony of the Straits Settlements at any place in the Malay-an Peninsula extending southward from the minth degree of north latitude, or in any island lying within twenty miles from the coast

thereof, by any of Her Majesty's subjects, or by any person being a subject of any of the native states in the said peninsula south of the said ninth degree of the north latitude, but who is at the time of his committing such crime or offence resident in the said Colony, or who has been so resident within six months before the commission of such crime or offence, shall be cognizable in the Courts of the said Colony exercising criminal jurisdiction and shall be inquired of, tried, prosecuted, and, upon conviction, punished in such and the same manner as if the crime or offence had been committed within the said Colony.

2. Any person known or suspected to have committed a crime or offence within the first section of this Act may be apprehended in the said Colony, and kept in custody therein in like manner as if the said crime or offence had been committed within the Colony.

# ACT No. XXIX of 1866.

To enlarge the jurisdiction of the Courts of Requests in the Settlement of Prince of Wales' Island, Singapore, and Malacca.

[24th October, 1866.]

Whereas by the Letters Patent re-constituting the Court of Judi
reamble. cature of Prince of Wales' Island, Singapore and Malacca, Her Majesty, among other things, anthorized and empowered the Governor or President and Council of the said Settlement for the time being to erect and establish such Court or Courts of Judicature as they should see fit for the recovery of small debts, and for the trial and determination of all suits and causes whatsoever against any of the inhabitants of the said Settlement, wherein the debt, duty, or matter in dispute should not exceed the value of thirty-two dollars; and whereas under the

said authority Courts of Requests have been established at Penang, Province Wellesley, Singapore, and Malacca; and whereas it is expedient that the said Courts, and also any other Courts which may licreafter be established under the said authority, should have jurisdiction in all suits wherein the matter in dispute shall not exceed the value of fifty dollars; It is enacted as follows:—

1. From and after the passing of this Act, any Court or Courts

Courts of Requests authorized to try suits to an amount or value not exceeding 50 dollars.

established or which may be established in the Settlement of Prince of Wales' Island, Singapore, and Malacca, under the said authority, shall have jurisdiction to try and deter-

mine all suits brought for the recovery of debts, and all suits and causes whatever against any of the inhabitants of the said Settlement or the places now, or at any time hereafter to be, subordinate or annexed thereto, wherein the debt, duty, or matter in dispute shall not exceed the value of fifty dollars.

Sections 2, 3, 4, 5, 6, 7 and 8 repealed by Distress Ordinance XIV of 1876.

9. A seal shall be made for every Court of Requests in the said

Settlement under the direction of the Governor of the said Settlement, and all summonses
and other process issuing out of any such

Court shall be sealed or stamped with the seal of the Court; and every person who shall forge the seal or any process of any such Court, or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of such Court, knowing the same to be false, or who shall act, or profess to act under any false colour or pretence of the process of the said Court, shall be guilty of felony.

10. Every person who shall give evidence in any Court of Requests in the said Settlement shall be examined on oath, or when exempt by law from taking an oath, on solemn affirmation; and

every person, who, in any examination upon oath or solemn affirmation, under this Act, shall wilfully and corruptly give false evidence, shall be deemed guilty of perjury.

11. Either of the parties to a suit or any other proceeding in any Court of Requests in the said Settlement may obtain, at the Office of the Clerk of such Court or other Officer as aforesaid, summonses to witnesses, with or without a clause, requiring the production of books, deeds, papers and writings in their possession or

control, and in any such summons any number of names may be inserted.

12. Fvery person, on whom any such summons shall have been served, either personally or in such other manuer as shall be directed by the general rules or practice of the Court of Requests out

of which such summons shall issue, and who shall refuse or neglect, without sufficient cause, to appear or to produce any books, papers, or writings, required by such summons to be produced, and also every person present in any such Court, who shall be required to give evidence, and who shall refuse to be sworn and give evidence, shall forfeit and pay such fine, not exceeding fifty dollars, as the Commissioners of such Court shall impose on him, and the whole or any part of such fine in the discretion of the Commissioners after deducting the costs, may be applied towards indemnifying the party injured by such refusal or neglect.

- 13. This Section is repealed by Section 8 of Debtors Ordinance XXII of 1870. In that, a warrant to arrest a defendant about to quit the Colony will only be issued when the debt or demand amounts to \$50 or upwards. The title of this Ordinance is omitted in the printing on page 605, but it is set down on page 604, as "Abolition of Imprisonment for debt."
- 14. Payment of any fine imposed by any Court of Requests under the authority of this Act may be enforced upon the order of the Commissioners of such Court in like manner as payment of any debt adjudged in the said Court, and shall be accounted for as herein provided.
- shall have made an order for the payment of money, the amount shall be recoverable, in case of default or failure of payment therefore the manner directed, by execution against the body or the goods and chattels of the person against whom such order is made, without further notice or order, and the Clerk of the said Court, or other Officer as aforesaid, at the request of the person prosecuting such order, shall issue under the seal of the Court a writ of execution to one of the Bailiffs of such Court,

or other Officer as aforesaid, at the request of the person prosecuting such order, shall issue under the seal of the Court a writ of execution to one of the Bailiffs of such Court, which shall be his warrant to take the body of such person in execution, or to levy, or cause to be levied by distress and sale of the goods and chattels of such person, such sum of money as shall be so ordered, wheresoever they may be found within the district of the Court, and also the costs of the execution; and all Constables and other Peace Officers within their several jurisdictions shall aid in the execution of every such writ.

16. If any such Court shall have made any order for payment of any sum of money by instalments, execu-

In case of order to pay by instalments, execution to issue on default of payment, without further notice. of any sum of money by instalments, execution upon such order shall not issue until after default in payment of some instalment according to such order (a); and execution or successive executions may then issue without

further notice or order for the whole of the said sum of money and costs then remaining unpaid, or for such portion thereof as such Court shall order, either at the time of making the original order, or at any subsequent time, under the seal of the Court.

17. Whenever any warrant shall issue for taking in execution

Warrants in execution against the body.

the body of any person under this Act, the Bailiffs of the Court of Requests out of which such Warrant shall issue, shall be empower-

ed, by virtue thereof, to take and convey him to any prison appointed by the Governor of the Settlement to be the prison of such Court, there to remain for such term as shall be directed by the warrant not longer than six calendar months, or until he shall sooner perform the order of such Court.

No person to be twice imprisoned, nor execution against body and goods to issue at the same time under same judgment. 18. No person shall be imprisoned twice under the same judgment, nor shall execution against the body and goods is sue at the same time under the same judgment.

19. Every Bailiff executing any process of execution issuing out of any such Court against the goods of any person, may, by virtue thereof, seize and take any of the goods of such person

(excepting the necessary wearing apparel and bedding of such person or his family, and the tools and implements of his trade), and may also seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to any such person against whom any execution shall have issued as aforesaid. (b)

20. If any person shall wilfully insult any Commissioner,

Penalty for contempts of Court.

Clerk, or Officer of any such Court, for the time being, during his sitting or attendance in Court, or shall wilfully interrupt the pro-

ceedings of any such Court, or otherwise misbehave in any such Court, it shall be lawful for any Bailiff, or Officer of the Court, with or without the assistance of any other person, by the order of a Commissioner of such Court, to take such offender into custody, and detain him until the rising of such Court; and the Com-

<sup>(</sup>a) See Ord, XXII of 1870, s. 7. (b) See Distress Ord, XIV of 1876, s. 10.

missioners shall be empowered, if they shall think fit, by a Warrant under their hands, and sealed with the seal of the Court, to commit any such offender to any prison to which they have power to commit offenders under this Act, for any time not exceeding seven days, or to impose upon any such offender a fine not exceeding twenty-five dollars, for every such offence, and in default of payment thereof, to commit the offender to any such prison as aforesaid, for any time not exceeding seven days, unless the said fine be sooner paid, or instead of inflicting summary punishment under this Act, may cause the offender to be indicted in the Court of Judicature if the offence be an indictable misdemeanor.

21. If any Officer or Bailiff of any such Court shall be assault-

Penalty for assaulting Bailiff, &c., in execution of duty. ed while in the execution of his duty, or if any rescue shall be made or attempted to be made of any person arrested or goods levied under process of any such Court, the person

so offending shall be liable to a fine not exceeding fifty dollars, to be recovered by order of such Court, or before a Magistrate, and the Bailiff of the Court, or any Peace Officer in any such case, may take the offender into custody (with or without warrant) and bring him before such Court or Magistrate accordingly.

22. If any Bailiff of any such Court, who shall be employed

Penalty for Bailiff neglecting, &c., to execute warrant, to execute any warrant of any such Court, shall, by neglect, or connivance, or omission, lose an opportunity of executing such warrant, then, upon complaint of the party ag-

grieved by reason of such neglect, connivance, or omission (and the fact alleged being proved to the satisfaction of the Court), the Commissioners of such Court shall order the Bailiff to pay such damages as it shall appear that the plaintiff has sustained thereby, not exceeding in any case the sum of money for which the said execution is issued, and the Bailiff shall be liable thereto, and upon demand made thereof, and on his refusal so to pay and satisfy the same, payment thereof shall be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said Court, without prejudice nevertheless to the execution of the original warrant.

23. If any Clerk, Bailiff, or other Officer of any such Court, acting under colour or pretence of the process of the said Court shall be charged with extortion or misconduct, or with not duly

paying or accounting for any money levied by him under the authority of this Act, the Commissioners of such Court may enquire into such matter in a summary way, and for that purpose may

summon and enforce the attendance of all necessary parties in like manner as the attendance of witnesses in any case may be enforced, and may make such order thereupon for the repayment of any money extorted, or for the due payment of any noney so levied as aforesaid, and for the payment of such damages and costs, as they shall think just, and also if they shall think fit, may impose such fine upon the Clerk, Bailiff, or Officer, not exceeding fifty dollars for each offence, as they shall deem adequate, and in default of payment of any money so ordered to be paid, payment of the same may be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said Court.

- 24. Every Clerk, Bailiff, or other Officer employed in putting any of the powers of this Act in execution, who shall wilfully and corruptly exact, take, or accept any fee or reward whatsoever,
- other than his lawful salary, for any thing done or to be done by virtne of this Act, or on any account whatsoever relative to putting this Act into execution, shall, upon proof thereof before the Court in which such Clerk, Bailiff, or Officer is employed, and in the case of a Clerk, on confirmation of the finding of the Court by the Governor of the said Settlement, be for ever incapable of serving or being employed under this Act in any office of profit or emolument, and shall also be liable for damages as herein provided.
- 25. If any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any Court of Requests under this Act, or in respect of the proceeds or value thereof,

by any person not being the party against whom such process has issued, the Clerk of such Court or other Officer as aforesaid, upon application of the Officer charged with the execution of such process, as well before as after any action brought against such Officer, may issue a summons, calling before the said Court, as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in the Court of Judicature in respect of such claim, shall be stayed, and the Judge of the Court of Judicature, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action, after the issue of such Summons out of such Court of Requests; and the Commissioners of such Court of Requests shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings as to them shall seem fit, and

such order shall be enforced in like manner as any order made in any suit brought in such Court.

26. If any person shall bring any suit in any Court of Judica-

Limit of damages in actions against Clerk, &c.

ture in the said Settlement in respect of any grievance committed by the Clerk, Bailiff, or Officer of any Court of Requests within the

jurisdiction of such Court of Judicature under colour or pretence of the process of the said Court of Requests, and upon the trial of the action no greater damages shall be found for the plaintiff, than the sum of two hundred and fifty dollars, no costs shall be awarded to the plaintiff in such action; unless the Judge shall certify in Court, upon the back of the record, that the action was fit to be brought in the Court of Judicature.

27. In all cases where any conviction shall be had for any offence committed against this Act, the form of conviction may be in the words or to the effect following (that is to say):—

Be it remembered that on this day of in the year A. B. is convicted before a Magistrate for the archefore a Commission of the convicted before a convicte

a Magistrate for the or before a Commissioner acting under Act No. XXIX of 1866 of having (state the offence) and I (or we) the said do adjudge the said to forfeit and pay for the same the sum of [or to be committed to for the space of ] Given under hand () and seal (\*) the day and year aforesaid.

28. No order, verdict of judgment, or other proceeding, made concerning the matters aforesaid, shall be quashed or vacuted for want of form. (a.)

Section 29 repealed by Distress Ordinance XIV of 1876.

30. All actions and prosecutions to be commenced against any person for any thing done in pursuance of this Act shall be commenced within three calendar months after the fact 'committed,

and not afterwards, and notice in writing of such action, and of the cause thereof, shall be given to the detendant one calendar month at least before the commencement of the action; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action is brought, or if after action brought a sufficient sum of money shall have been paid into Court, with costs by or on behalf of the defendant.

<sup>(</sup>a) It seems probable that the word "of" in this Section is a misprint for "or," "verdict or judgment" being the words employed in 9 and 10 Vict c. 95, s. 136, and Act IX of 1850, s. 109.—By Maxwell,

The following Schedules of Distress Ordinance XIV of 1876 are here inserted as they superseded the ones under this Act.

A. Scale of Fees to be levied in Distraints for Rent, Section 5.

|                                                     | 1      | Sums su                                | ED FOR. | 1 | Affidavit. Warrant to distrain,<br>Notices, &c.                                            | Order to sell.     | Commission.                                                                                             |
|-----------------------------------------------------|--------|----------------------------------------|---------|---|--------------------------------------------------------------------------------------------|--------------------|---------------------------------------------------------------------------------------------------------|
| 5<br>10<br>20<br>30<br>40<br>50<br>75<br>100<br>250 | nd und | er 5 10 20 30 40 50 78 100 250 500 500 | dollars |   | Dol. Ct.<br>0-25<br>1-00<br>2-00<br>3-00<br>4-00<br>5-00<br>6-00<br>7-50<br>10-00<br>15-00 | Twenty-five Cents. | Dol. Ct. 0-25 0-50 1-00 1-50 2-09 2-50 3-75 5-00 One dollar for every 20 dollars or part of 20 dollars. |

The above scale is intended to include all expenses, except in suits where the tenant disputes the landlord's claim, and witnesses have to be subposnaed, in which case each subposna must be paid for at twenty-five cents. Where watchmen are kept in charge of property distrained, twenty-five cents per day must be paid per man.

(The Courts of Requests have power to issue Warrants of Distress under Section 1 of Ord. XIV of 1876, where the amount of rent to be recovered shall not exceed the amount of the jurisdiction of those Courts. The above Scale of Feeds also applicable to the Supreme Courts when the amount to distrain exceeds \$ 50. See the Ordinance.

Ŕ.

Form of Affidavit for Distress, Section 7.
In the Court of Requests, at ( )

A. B. (Plaintiff).

versus

C. D. (Defendant).

A. B., inhabitant of in the Settlement of maketh oath and saith, that C. D., who is also an inhabitant of the

(town) of is justly indebted to . in the sum of dollars for arrears of rent of the house and premises No. situated at in the Settlement of due for months, to wit, from at the rate of dollars per mensem. Sworn before me, the day of 187

Commissioner.

C.

Form of Warrant, Section 8.

In the Court of Requests, at ( )

I hereby direct you to distrain the goods and chattels on the premises of A. B., situate in in the for the sum of dollars, being the amount of months' rent due to C. D. for the same on the day of last, according to the provisions of the Distress Ordinance, 1876. Dated day of

(Signed & Sealed.)

To

Commissioner of Court of Requests.

E. T.

Sworn Bailiff and Appraiser.

D.

Form of Inventory and Notice, Section 11.

In the Court of Requests, at ( )

(State particulars of goods seized.)

Take notice that I have this day seized the goods and chattels contained in the above inventory for the sum of dollars, being the amount of months' rent due to C. D. on last, and that unless you pay that amount, together with the costs of this distress, within five days from the date hereof, or obtain an order from the Court to the contrary, the same will be appraised and sold, pursuant to the provisions of the Distress Ordinance, 1876.

(Signed) E. F.

To

Sworn Bailiff and Appraiser.

A. B.

 $\mathbf{E}$ 

Form of Notice of Sale of Distress, Section 18.

In the Court of Requests, at ( )

Take notice that we have appraised the goods and chattels seized on the under the provisions of the Distress Ordinance, 1876, of which a Notice and Inventory had been duly served upon you under date the and that the said goods and chattels will be sold on the pursuant to the provisions of the said Ordinance.

(Signed) E. F.

, G. H.

Sworn Bailiffs and Appraisers.

 $\mathbf{F}$ .

Form of Power of Attorney to Distrain, Section 7.

I (or we), A. B., do hereby authorize C. D. to be my (our) Agent to act for me (us) in distraining, under the Distress Ordinance, 1876, for (all) (the) arrears of rent now due to me (us) (or to be hereafter due) on property situated in (here describe property), as to which I am (we are) entitled to distrain as (Owner, Lessee, Trustee, Guardian, &c.), alone (or together with E. F.), &c.

Dated \_\_\_\_\_

(Signed) A. B.

RULES FRAMED BY THE GOVERNOR AND COUNCIL.

In pursuance of Her Majesty's Letters Patent for reconstituting the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, paragraph 64.

Published in the Government Gazette, December 21st 1866.

Notification .-- No. 239.

Singapore, the 21st December 1866.

THE following Revised Rules and Regulations for the Courts of Requests in the Straits Settlement, are published for general information.

By Order,

M. PROTHEROE, Lieut.,

Deputy Secretary to Government,

Straits Settlement.

- I.—All proclamations, orders, rules, and regulations relating to Courts of Requests heretofore issued are hereby revoked.
- II Before issuing any Summons, the Clerk of the Court shall enter into the cause book to be provided for that purpose, the names of the parties and the sum demanded, and the cause of action, and every Summons shall contain these particulars and shall be directed to the Defendant.
- III.—The Summons and a copy thereof shall be delivered to a peon of the Court, who shall serve the Defendant with the copy, either personally or by leaving the same at the dwelling house, shop, or place of business of the Defendant, three clear days before the day of the return of Summons exclusive of the day of service and of the return of Summons.
- IV.—Every Summons shall be returnable in five days from the date of issuing the same, and upon the return thereof, and upon proof of the due service of a copy of the same, whether the Defendant be present or not, the Court shall proceed to hear and determine the matter contained in the Summons, unless the Defendant shall show sufficient cause to the Court to adjourn the hearing of the cause to such further time as to the Court shall seem reasonable, provided that, if on the return of the Summons or at the adjourned hearing of the cause, the Plaintiff shall not appear or appearing, shall not make proof of his or her debt, or demand to the satisfaction of the Court, a nonsuit may be entered against such Plaintiff, and the Court shall award such costs against him or her, as the case may seem to require, so as they be in accordance with the table of fees hereinafter contained. Provided always, that the Court may from time to time extend the time for the return of any Summons by endorsement thereon.
- V.-All causes shall be heard according to the order in which they stand in the cause book, so far as the same shall be practicable.
- VI.—In all cases, the names of the parties and of their witnesses, together with a minute of their evidence, and the decision of the Court thereon shall be entered in a book to be kept for that purpose.
- VII.—Where the debt or demand exceeds the sum of fifteen Dollars, the Court may, upon proof of the Plaintiff's claim, and that the Defendant is about to withdraw his person from its jurisdiction, issue in the first instance a warrant for the apprehension of the Defendant, and may commit him to gaol until he shall find

security for his appearance in such Court, from time to time, until judgment shall be pronounced upon the Plaintiff's claim. (a)

VIII.—Whenever it shall be necessary to issue a warrant for the apprehension of a Defendant before any order or decree has been made against him by the Court, the Plaintiff or some other person in his behalf shall make an affidavit or affirmation in writing, verifying his claim or demand and stating the cause of action and his belief that the Defendant conceals himself from, or otherwise evades the process of such Court, or is disposing of his property and effects with intent to defraud the Plaintiff or his creditors generally, or is about to withdraw his person or effects from the jurisdiction of such Court, stating also in the affidavit or affirmation his reasons for such belief, which affidavit or affirmation his reasons for such belief, which affidavit or affirmation shall be filed of record, and a copy thereof shall be served on the Defendant, and translated to him at the time of executing the warrant. Provided always, that the granting of such warrant for any of the reasons abovenamed shall be at the discretion of the Court.

IX.—No execution against the body or the goods and chattels of the person against whom an order for the payment of money is made shall issue, within twenty-four hours from the making of such order, unless the Court shall be satisfied upon sufficient proof that such person is about to withdraw his person or effects from the jurisdiction of such Court, or is disposing, or has disposed of his property or effects with intent to defraud the Plaintiff or his creditors generally.

X.—No person confined in any prison under a warrant or process from a Court of Requests shall be detained in prison for any longer time than the following periods, according to the amount or sum for the payment of which such warrant or process shall issue, that is to say:—For any sum not exceeding fifteen Dollars, sixty days; above fifteen Dollars and not exceeding thirty Dollars, ninety days; and for any sum above thirty Dollars, according to the discretion of the Court, for any period above ninety days, not exceeding in the whole six calendar months.

<sup>(</sup>a.) In Maxwell's "Practice of the Courts of Requests," page 54, it has the following remarks to Rule VII.

<sup>&</sup>quot;The repeal of the Section (13) which gave the Court these powers does not affect the 7th Rule which, independently of the Act, gives the Court authority to issue a warrant for the apprehension of the defendant "upon proof of the plaintiff's claim and that the defendant is about to withdraw his person from its jurisdiction." This Rule however appears to be negatived by the Debtor's Ordinance 1870, s. 3, which enacts, that, with the exceptions therein mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money."

XI.—The person or persons at whose suit any warrant or process for the arrest of any person shall be issued out of the Court shall, previous to the arrest being made, deposit with the Clerk or the Officer to whom such process shall be delivered for the purpose of executing the same, a sum of money sufficient to provide for the subsistence of the Defendant for the period of seven days, in the case of a European, Armenian or Eurasian, or their descendants, at the rate of twelve cents a day, and in the case of all other persons, at the rate of six cents a day, which sum or so much thereof as shall be necessary shall be applied at the above rate by the Officer executing the warrant or process for the subsistence of the person arrested from the time of the arrest until he shall be lodged in gaol, and the balance, if any, shall be deposited by such Officer with the Keeper of the gaol to which the person arrested shall be committed, and the money so deposited shall be employed for the subsistence of the prisoner.

XII.—The Officer by whom any arrest shall have been made, shall forthwith give notice of the arrest and of the date on which the same was made to the Plaintiff or his Attorney.

XIII.—The person at whose suit any warrant or process for arrest shall have issued shall, at or before the end of seven days from the date of the arrest, deposit with the keeper of the gaol in which the person arrested shall be lodged a further sum at the rate aforesaid, for the subsistence of the prisoner for the next ensuing seven days and shall continue to make a similar deposit in advance at or before the end of such period of seven days, and of every subsequent period of seven days during which the prisoner shall be detained in custody, and for every such advance, the Keeper of the gaol, or other Officer, as the case may be, shall give a receipt for the same, dated on the day on which the money shall be paid.

XIV.—No arrest shall take place unless the required deposit shall have been previously made; and if any subsequent deposit be not made on or before the day on which it ought to be made, the Court may, upon an application, by or on the behalf of the prisoner, order him to be discharged out of custody.

XV.—The amount spent in providing subsistence for a prisoner detained in execution shall be costs in the cause and shall be added to the amount of the judgment, and the prisoner shall be liable to be detained in execution for the amount in the same manuer as if such amount had been included in the judgment and writ of execution.

XVI.—All money deposited as aforesaid which shall not have been spent at the time of the prisoner's discharge from custody, shall be returned to the person who made the deposit.

XVII.—All Warrants and Writs of Attachment shall be signed by the Commissioner of the Court, out of which the same shall be issued, but all Summonses, Subpostas and Notices may be signed by the Clerk of the Court.

XVIII.—The Court shall in all suits adapt its procedure and practice to the different religions, manners and usages of the persons who shall be resident or commorant within its jurisdiction, so far as the same may be consistent with the due execution of the law, and the attainment of substantial justice.

XIX.—The following fees only shall be demanded from suitors, and allowed as costs between part and party:—

|                          |        |        |        |       |      |     |      |       | ]    | \$               | Cts. |
|--------------------------|--------|--------|--------|-------|------|-----|------|-------|------|------------------|------|
| Entering complaint from  | •••    |        | •••    | \$    | 1    | to  | \$.  | 5     | 1    | 11               | 50   |
| do                       |        | ***    | ***    | ,,    | 5    | ,,  | ,,   | 10    |      | 1 -              | ,,   |
| do                       |        |        | • • •  | ,,    | LO   | ,.  | ,,   | 15    | - 1  | 1                | 50   |
| ďο                       |        |        |        | ,, 1  | 15   | ,,  | ,,   | 20    | ]    | 2                | .,   |
| do                       |        |        |        | ,, 2  | 20   | ,,  | ,,   | 25    |      | $\overset{2}{2}$ | 50   |
| dq                       |        | •••    |        | ,, 2  | 25   | ,,  | ٠,   | 30    |      | 3 `              | ,,   |
| do                       |        |        |        | ,, (  | 30   | 17  | ,,   | 35    |      | 3                | 50   |
| da                       |        |        |        | ,, :  | 35   | 11  | ,,   | 40    |      | 4                | ١,,  |
| do                       |        | •••    | *      | ,, 4  | 10   | ,,  | ••   | 45    |      | 4                | 50   |
| do                       | ***    |        | •••    | ., 4  | 15   |     |      | 50    |      | 5                | ,,   |
| For Summons to each Defe | ndant  | and    | serv   | ice o | f sa | me. |      |       |      | ,,               | 50   |
| ., Subpœna               |        |        |        |       |      |     |      |       |      | ,,               | 25   |
| " Drawing Affidavit and  | admi   | niste  | ring ( | oath  |      |     |      |       |      | ,,               | 50   |
| , Warrant and Attachr    | nent   |        |        |       |      |     |      |       |      | ï                | ,,   |
| ., Postponement and Not  | ice th | ereof  | f to e | ach . | Def  | end | ant  |       |      | ,,               | 25   |
| " Every Search           | •••    |        |        |       |      |     |      |       |      | 11               | 25   |
| " Every Notice of Applic |        |        |        |       |      |     |      |       |      | ï                |      |
| , Every Bond             |        | •••    |        |       |      |     | • •  |       |      | -                | 50   |
| , Copies of Depositions, | Orde   | rs. I  | Recor  | ds. a | and  | all | otl  | ıer   | Pa-  | ",               |      |
| pers and Proceedings of  | f the  | Con    | rt re  | aniri | nø   | the | atte | esta  | tion |                  |      |
| of the Sitting Commiss   | ioner  | . ner  | folio  | of 1  | 600  | WO! | rds  |       |      |                  | 25   |
| " Every succeeding foli  |        | , 1,02 |        |       |      |     |      |       |      | "                | 25   |
| , Every re-hearing No    |        |        |        |       |      |     |      |       | 1    | **               | 50   |
| Translator's 1           |        | •••    | •••    | •••   | ••   |     | ••   | •••   | ***  | 17               | ų.   |
| For folio of 100 words   | COD.   |        |        |       |      |     |      |       | 1    |                  | 25   |
| the some of the Mornd    |        | •••    | •••    | •••   | ••   |     | ••   | • • • |      | ,,               | 20   |
|                          |        |        |        |       |      |     |      |       | 1    |                  |      |

XX — The Scale of Fees under this Rule is superseded by the one given in the Schedule A to Distress Ordinance XIV of 1876.—
See page 618.

XXI.—Rule 21 is superseded by the following paragraph, taken from the Government Gazette December, 20th, 1867, page 463.

#### EXECUTION.

Bailiff's poundage to be charged at the rate of 25 cents for the first \$5 or less on the amount specified in the Warrant. 50 cents

for any amount between \$5 and \$10, and 25 cents additional for every sum of \$5 or part thereof above the sum of \$10. Whether the execution be upon the person or goods of the execution Debtor.

XXII.—A detailed statement of all fees received by the Clerks, Bailiffs, or other Officers of the Court, and of all fines and penalties recovered under the authority of Act 29 of 1866, shall be submitted to the Commissioner of the Court, once in every week, who shall examine and sign the same, and shall cause the amounts collected to be forthwith paid into Her Majesty's Treasury to the account of the General Revenue of the Settlement, forwarding at the same time a copy of the said statement, certified under his signature to the Officer in charge of the Treasury.

### BOND ON RETURN OF GOODS SEIZED FOR RENT.

In the Court of Requests at (

A. B., Plaintiff,

versus

C. D., Defendant

KNOW ALL MEN BY THESE PRESENTS, that we respectively, within the local of limits of the jurisdiction of the said Court are jointly and severally held and firmly bound to the said in the sum Dollars to be paid to the said or his Attorney. Heirs, Executors, Administrators or Assigns, for which payment we bind ourselves and each of us, and each and every of our Heirs, Executors, and Administrators firmly by these presents, sealed with our seals, dated this day of The consideration of the obligation is such, that if the above bounden or before the next and prosecute his said suit with effect and without delay against the said for the taking and unjustly detaining his goods and chattels and do deliver the said goods and chattels if a return thereof shall be adjudged by the said Court, that then this present obligation shall be void otherwise to remain in full force.

Sealed and delivered, in the presence of

## F.

## WARRANT FOR THE RESEIZURE OF GOODS.

In the Court of Requests at (

Between

A. B., Plaintiff,

versus

C. D., Defendant,

WHEREAS upon hearing this action herein the Court hadjurisdiction, at a Court holden on the day of at before

Commissioner of the said Court, it was adjudged that the said Defendant should return to the Bailiffs of the Court the goods and chattels distrained for and returned to the said Defendant forthwith and whereas the said Defendant has not returned to this Politiff the said mode and chattels now

has not returned to this Bailiff the said goods and chattels pursuant to the said judgment.

These are, therefore, to require and order you that without delay you reseize the said goods and chattels so returned as aforesaid to the said Defendant.

Given under the seal of the Court, this day of 186. By the Court,

To

Clerk.

Bailiffs of the said Court, and the other Bailiffs thereof.

G.

## ORDER FOR SALE OF GOODS DISTRAINED AND PAYMENT OF COSTS OF DISTRESS.

In the Court of Requests at (

A. B., Plaintiff, .

versus

C. D., Defendant.

Upon hearing this action at a Court holden on the day of

It is ordered that the goods distrained from the above

Defendant be sold on the day of

now next ensuing, and that the said Defendant do pay the sum of Dollars, the amount of the costs incurred by the said Plaintiff in this action to the Clerk of the Court at this Office, on or before the day of and it is further ordered that if a Warrant of Execution issue against the body of the said Defendant, the term of days be inserted therein as the term of his imprisonment under the same.

Given under the seal of the Court, this day of 186

By the Court,

Clerk.

Straits Govt. Gazette Supplement, Dec. 28, 1866.

NOTIFICATION.

No. 68.

Singapore, the 15th February, 1867.

THE following additional Rule for the Court of Requests in the Straits Settlement is published for general information:—

In the case of a Summons issued at one of the District Courts, at Prince of Wales' Island, Malacca, or Province Wellesley it may be made returnable at the next sitting of the Court in the same District, instead of within the period of five days, as otherwise prescribed."

(Sd.) ORFEUR CAVENAGH, Major General,

Governor, Straits Settlement.

(Sd.) R. Macpherson, Lieut.-Col., Resident Councillor, Singapore.

Singapore, 24th January, 1867.

Compiled and arranged by S. Leicester, Printed at the Commercial Press, by Heap Lee & Co.,

PENANG.

1877.

| 12                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |              |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| Ab Dorahim vs. Newbold.—An order to a person from his superior officer to seize and detain any boats or vessels proceeding to places within certain prohibited limits for the purpose of observing a neutrality professed by the Government between two belligerent chiefs, will not authorize a seizure of a vessel and cargo returning from a place not within such prohibited limits, although she might have gone elsewhere and not assisted either of such chiefs | page.        |
| Mohuddeen.                                                                                                                                                                                                                                                                                                                                                                                                                                                             |              |
| Act (Malacca land) XVI of 1839 s. 12—prescription—reasonableness of custom—effect of charter:—see Sahrip vs. Mitchell.                                                                                                                                                                                                                                                                                                                                                 |              |
| ,, to regulate sentences imposed by Colonial Courts—37 and                                                                                                                                                                                                                                                                                                                                                                                                             |              |
| 38 Vict. c. 27                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 609.         |
| ,, to extend jurisdiction of Straits Courts to certain offences                                                                                                                                                                                                                                                                                                                                                                                                        | 1            |
| committed out of the Colony                                                                                                                                                                                                                                                                                                                                                                                                                                            | 610.         |
| Action—cause arose abroad—defendant abroad—goods seized by Sequestration—no jurisdiction:—see Khu Poh vs. Wan Mat.                                                                                                                                                                                                                                                                                                                                                     |              |
| Adhesive Stamp-a 3 cent one on a Promissory note-not admissa-                                                                                                                                                                                                                                                                                                                                                                                                          |              |
| ble in evidence; (Stamp Ord. VIII of 1873 cancels the practice.)—see Koh Buan vs. Teoh Choon.                                                                                                                                                                                                                                                                                                                                                                          |              |
| Adjournment—Magistrate's refusal—no ground for an appeal:—see<br>Velloo Pullay vs. Kadier and Coopay.                                                                                                                                                                                                                                                                                                                                                                  |              |
| Adley vs. Robertson.—Arrest in church—false imprisonment—too hasty—Judgment for plaintiff                                                                                                                                                                                                                                                                                                                                                                              | 56.          |
| Administration granted to a widow where no will existing—revoca-<br>tion—Will admitted to Probate:—see In the Goods of Ab-<br>dullah.                                                                                                                                                                                                                                                                                                                                  |              |
| ,, right of widow to :- see In the Goods of Khoo Chow Sew.                                                                                                                                                                                                                                                                                                                                                                                                             |              |
| Bond;—see In the Goods of Khoo Chow Sew.                                                                                                                                                                                                                                                                                                                                                                                                                               |              |
| ,, distribution when two wives;—see In the Goods of Lao                                                                                                                                                                                                                                                                                                                                                                                                                |              |
| Long An, and of Chu Siang Long.  Administratrix who is also an Executrix conveying land—validity                                                                                                                                                                                                                                                                                                                                                                       |              |
| of same :—see Lim Sun Poh vs. Lim Kin.                                                                                                                                                                                                                                                                                                                                                                                                                                 |              |
| Admiralty jurisdiction-Penal servitude for offences triable by Colo-                                                                                                                                                                                                                                                                                                                                                                                                   |              |
| nial Courts under their—16 and 17 Vict. c. 99. s. 6                                                                                                                                                                                                                                                                                                                                                                                                                    | 583.         |
| ,, jurisdiction under 1mperial Colonial Act, 37 and 38 Vict.                                                                                                                                                                                                                                                                                                                                                                                                           | 200          |
| c. 27—sentences                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 609<br>79,84 |
| Adopted child not entitled to inherit intestate's estate                                                                                                                                                                                                                                                                                                                                                                                                               | 19,04        |
| Advocates and Attornies, admission of : see In the matter of Ah-amado Bawa.                                                                                                                                                                                                                                                                                                                                                                                            |              |
| Alteration in a deed after execution—void :—see Kho Guan Chiat vs.  Tan Glok Lan.                                                                                                                                                                                                                                                                                                                                                                                      |              |
| Animals, injuries by—domestic—knowledge of owner:—seeFarquhar                                                                                                                                                                                                                                                                                                                                                                                                          |              |
| vs. Shellumbrum.                                                                                                                                                                                                                                                                                                                                                                                                                                                       |              |

|         | ,                                                                                                                                                                                                                                                                                        | page.    |
|---------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Appeal, | Act XX of 1837 only refers to transfer of property but not the nature of it—Mahomedan husband takes no interest of                                                                                                                                                                       | 10       |
|         | his wife's property before or after her death:—see Halleemah vs. Bradford.                                                                                                                                                                                                               |          |
| *       |                                                                                                                                                                                                                                                                                          |          |
| 71      | conviction of two offences under one penalty—mistake incurable:—see The Opium Farmer vs. Khoo Boo An.                                                                                                                                                                                    | ,        |
| "       | conviction may be amended for an informality:—see Peter Duggie es. F. Gibbons.                                                                                                                                                                                                           |          |
| **      | Court will not restraint a Magistrate from hearing a case on<br>the ground that the Magistrate is biased against the party<br>applying:—see The Opium Farmer vs. Koh Boo Ann.                                                                                                            |          |
| 71      | Costs, by whom payable                                                                                                                                                                                                                                                                   | 445.     |
| , 31    | Gambling—house owner for permitting—proof of guilty knowledge necessary:—see Hajee Mahomed Arsad vs. Dunlop, and Tan Toh Lee vs. Hat.                                                                                                                                                    |          |
| יפל     | Gambling—found therein—Police have no authority to search boxes, other than the place where gambling was going on—order of forfeiture quashed:—see Reg vs. Song Sam.                                                                                                                     |          |
| **      | Magistrate had jurisdiction under Act XIII of 1859 to order labourers to return to work, for refusing to work before end of term if brought up after end of term:—see Lamb vs. Ponen.                                                                                                    |          |
| ** 1    | no ground, if Magistrate refused to adjourn a case:—see Velloo Pullay vs. Kadier and Coopay.                                                                                                                                                                                             |          |
| 11      | no ground, if Magistrate admitted evidence in reply, if witnesses were called after the prosecution was closed:—see Ong How vs. Abdulrahman.                                                                                                                                             |          |
| ••      | not necessary for Spirit Farmer to enter and inspect premises where liquors are stored before summoning—he may sue on the accounts rendered if there was a deficiency:—see Law Seow Huck vs. The Spirit Farmer.                                                                          | ٠        |
| ,,,     | struck off, if appellant not filing his case in Court within six days after receiving it from the Magistrate:—see Ong Pak Ong vs. Tan Boon Teng.                                                                                                                                         |          |
| **      | to Privy Council-Power of-from the Straits Courts                                                                                                                                                                                                                                        | 569.     |
| Appoint | ments—what officers to take the acknowledgments of deeds of married women                                                                                                                                                                                                                | 260,428. |
| Arms a  | nd vessel, seizure and detention of—suspicion of piracy:—see Lim Bee vs. Jadee.                                                                                                                                                                                                          |          |
| Arnash  | ellum Chetty vs. Mahomed Nina Merican and anr.—To an action on a Mortgage Bond, defendants pleaded that no money at all passed between plaintiff and them for the making of the Bond but the same was only a nominal mortgage and was ante-dated and made to defeat the creditors of de- |          |
| A 5-    | fendants.—Held on demurrer that the plea was had                                                                                                                                                                                                                                         | 251.     |
|         | of judgment—construction of Statutes—see Reg vs. O. & F.                                                                                                                                                                                                                                 |          |
| Assauli | and arrest:—see False Imprisonment.                                                                                                                                                                                                                                                      |          |

| Assignment of property by a Mahomedan married woman—husband to join:—see Kader Meydin vs. Shotamah.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | page.  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| ,, defective—realty—volunteer:—see Shotamah vs. Kader<br>Meydin.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |        |
| Attap house—built or renewed in Town :- see Reg vs. D'Oliveiro.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |        |
| Attorney General vs. Kam Kong Gay &c.—Local Excise Act XXIX of 1867 cancels, by implication, all Government Excise Contracts between the parties under Indian Act XXX of 1866—                                                                                                                                                                                                                                                                                                                                                                                                                                             |        |
| Judgment for the Crown                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 257.   |
| "Augustine Grangier," at the suit of the Owner and Master of the "Flora."—If a vessel meets another in distress and renders assistance and is thereby prevented from proceeding on her voyage and looses anything by not proceeding on such voyage, the vessel assisted will not be liable to make up such loss unless the Captain or person who has the power                                                                                                                                                                                                                                                             |        |
| to do so, promises to pay it                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 175.   |
| Bacon's (Lord) advice to a Judge                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 1.     |
| Bastard made legitimate after parents marriage by Scotch Law                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 84.    |
| Baumgarten vs. Kraal.—Where property was seized and sold under an execution from an inferior Court and after seizure but before sale the same property was seized by the Sheriff on a Writ of Sequestration:—Held, that the Sheriff could not maintain an action against the officer of the inferior Court for wrongfully selling more than was sufficient to cover the execution and for not paying over such surplus to him. Property seized under a Writ, whether right or wrong, is in custodia legis and cannot be seized under another Writ as                                                                       |        |
| long as that seizure lasts                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 429.   |
| Bencoolen from a Presidency to a Factory subject to Fort William in Bengal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 106.   |
| Betel or Seree Regulation, breach of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 23,448 |
| Bond, action on surety,—Insurance on a French vessel—loss of<br>ship—ignorance of Master—drifted by tide:—see Verapa<br>Chetty vs. Ventre.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | ·      |
| ,, action on,—Mahomedan married woman—plea of coverture is no answer:—see Chulas and Kachee vs. Kolson.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |        |
| " sham—made to defeat creditors:—see Arnashellum Chetty vs. Mahomed Nina Merican.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |        |
| Boustead and ors. vs. Clarke and ors.—Where the freighter of a vessel purchases goods from the plaintiffs, and they by his order and on his account and risk consign them to the place of destination and agree to take a specified return cargo or failing that, Manila sugars at certain prices on the return of the vessel, or in 5 months—and sugars were shipped by the consignees to the plaintiffs on his account and the price debited against him—and in letters from him to the plaintiffs, he only recognizes their right to hold them as security for their claims—and they take no steps during the voyage to |        |

| treat them as their own:—Held that the freighter must be considered the owner of the sugars, and that they came into           | page.  |
|--------------------------------------------------------------------------------------------------------------------------------|--------|
| the ship owner's hands as his. and that they had therefore a<br>lien upon the sugars, for the gross amount of freight due to   |        |
| All and the Clastic B                                                                                                          | 391.   |
| Breach of Agreement:—see Contract.                                                                                             | JøI,   |
| British born subject subjected to English Law under the Calcutta                                                               |        |
| Charter and Natives their own, before the 1st Charter (1807)                                                                   |        |
| of Penang was introduced                                                                                                       | 112.   |
| Brown and ors. vs. Duncan :- A person who fits out an expedition for                                                           | ,•     |
| the sole purpose of seeking and saving property lost, and                                                                      |        |
| embarks his capital in the undertaking, and employs suita-                                                                     |        |
| ble and skilful persons for carrying it into execution and                                                                     | 9      |
| charters and equips vessels with no other object in view,                                                                      |        |
| with no cargo on board, and without any ulterior destination,                                                                  |        |
| stands in a very different situation from the ordinary<br>owners of vessels, which happen in the course of their voy-          |        |
| age, to meet a vessel in distress and render assistance. 50                                                                    |        |
| per cent on such outlay or advance of capital under such                                                                       | *      |
| circumstances is a fair and reasonable sum for compensation                                                                    | 395.   |
| ,, vs. Hay.—An agreement between a person who advances                                                                         |        |
| money on an adventure to save property and the salvors of                                                                      |        |
| such property, that the latter should, in consideration of                                                                     |        |
| their receiving a certain allowance from the former, assign                                                                    |        |
| and transfer to the former, all compensation they may be en-                                                                   |        |
| titled to for such salvage, cannot be enforced; the law will<br>not bestow the fruits of labour upon those who have lent no    |        |
| hand to the work. Such an agreement will not be enforced,                                                                      |        |
| especially against the owners of the property, who were no                                                                     |        |
| parties to it, when in a suit for accounts of the adventure                                                                    |        |
| such person attempts to set off against such owners the                                                                        |        |
| amount paid by him to the salvors, and at the same time,                                                                       |        |
| claims the compensation of the salvers assigned and trans-                                                                     | 401    |
| ferred to him as aforesaid                                                                                                     | 401.   |
| Buffalo, cow and horse, injuries by :—see Farquhar vs. Shellumbrum.                                                            |        |
| Captains or headmen of natives appointed to administer justice in                                                              | 79.05  |
| certain cases                                                                                                                  | 72,95, |
| Caunter vs. Brown and ors.—If A in compliance with an order from B. sends goods for him, but to C, A's agent, and the dealings |        |
| between A and B, are on terms of credit, but A instructs                                                                       |        |
| C, his agent, not to deliver the goods but an payment of                                                                       |        |
| their price, and C accordingly detains the goods from B, on                                                                    |        |
| which he brings an action :- Held that as A had no right to                                                                    |        |
| detain the goods on account of his terms with B, he could                                                                      |        |
| no more give C, his agent, the right to detain the goods as                                                                    |        |
| against B, who was a stranger to such instructions and                                                                         |        |
| whose dealings with A were on entirely different terms.                                                                        |        |
| B, on C's refusal to deliver the goods wrote to him saying that if his instructions were to refuse delivery of the             |        |
| goods till they were paid for, he must hold them at the risk                                                                   |        |
| Bracks our ones, Mere bord for ure mean water among on one trest                                                               |        |

|                                                                                                                           | of A, his prin                 |            |                |         |                                       |                  |         |        | page.        |
|---------------------------------------------------------------------------------------------------------------------------|--------------------------------|------------|----------------|---------|---------------------------------------|------------------|---------|--------|--------------|
| in them: "—Held, that this letter did not amount to a dis-                                                                |                                |            |                |         |                                       |                  |         |        |              |
| claimer, but to a mere statement that if the goods were de-<br>liverable only on payment, they were not the goods he con- |                                |            |                |         |                                       |                  |         |        |              |
|                                                                                                                           | tracted for, a                 |            |                |         |                                       |                  |         |        |              |
|                                                                                                                           | less any right                 |            |                |         |                                       |                  | ***     | ***    | 205.         |
| Cause of                                                                                                                  | action arose                   |            | •              |         |                                       |                  |         |        | •            |
|                                                                                                                           | Sequestration                  | -no ju     | risdictio      | n :—se  | e Khu                                 | Poh vs           | . Wan   | Mat.   |              |
| Certiora                                                                                                                  | ri, "found the                 |            |                |         |                                       |                  |         |        |              |
| ١.                                                                                                                        | found in gam                   |            | -              |         |                                       |                  | -       | -      |              |
|                                                                                                                           | Reg vs. Song                   | _          |                |         |                                       | _                |         |        |              |
| Charter,                                                                                                                  | what is a                      |            |                |         | •••                                   | 3**              |         | ***    | 108          |
| ,,                                                                                                                        | date of 1st                    |            |                |         | •••                                   |                  | •••     |        | 87,95.       |
| ,,                                                                                                                        | ,, 2nd                         | •••        | ٠.٠.           |         |                                       |                  | •••     | .,.    | 87.          |
| 1,                                                                                                                        | ,, 3rd                         |            | •••            |         |                                       |                  |         |        | ib.          |
| ,,                                                                                                                        | 1st was brou                   |            | lst Reco       | rder    |                                       |                  |         |        | 105.         |
| ,,                                                                                                                        | Straits Settl                  | •          |                |         | •••                                   |                  |         |        | 600.         |
| Charital                                                                                                                  | ole land:—see                  |            |                |         | let Mol                               | nuddeer          | 1.      |        |              |
|                                                                                                                           | dopted—not e                   |            |                |         |                                       |                  |         |        | 79,84        |
|                                                                                                                           | ledging—unla                   |            |                |         |                                       | nd Har           | ninah   | 7      | ,            |
|                                                                                                                           | leow Neoh vs.                  |            |                |         |                                       |                  |         | cting  |              |
| Onoa Ci                                                                                                                   | rents and pro                  |            |                |         |                                       |                  |         |        |              |
|                                                                                                                           | monies, held                   |            |                |         |                                       |                  |         |        |              |
|                                                                                                                           | petuities, and                 |            |                |         |                                       |                  |         |        | 421.         |
| Choa Cl                                                                                                                   | nong Long's W                  |            |                | -       |                                       |                  |         |        | 417.         |
|                                                                                                                           | and anr. vs. K                 |            |                |         |                                       |                  |         | rtare  | ,            |
|                                                                                                                           | by a Mahome                    |            |                |         |                                       |                  |         |        |              |
|                                                                                                                           | on her Bond                    | •••        |                | •••     | · · · · ·                             | •••              | •••     | •••    | <b>4</b> 62. |
| Civil an                                                                                                                  | d Criminal la                  | w not      | in exist       | ence b  | efore 1                               | the Ch           | arter—  | -suits |              |
|                                                                                                                           | heard and de                   | termine    | d accor        | ding to | law of                                | f nature         | •       | ***    | 72.          |
| Claridge                                                                                                                  | e's (Sir John) (               |            |                |         |                                       |                  | ening o | f the  |              |
|                                                                                                                           | first Sessions                 | -          |                |         |                                       |                  | . ***   |        | 2.           |
| Commis                                                                                                                    | sioners appoin                 |            | admit          | ackno   | wledgo                                | nents o          | of dee  |        |              |
|                                                                                                                           | married won                    |            | •••            | ***     | ***                                   | ***              | ***     |        | 260,428.     |
| Conjuga                                                                                                                   | l rights—resi                  |            |                | urisdic |                                       | to ente          |         |        | ,            |
|                                                                                                                           | amongst Hin                    |            |                |         |                                       |                  |         |        |              |
| ÷                                                                                                                         | rights—resti<br>Chinese wife   | :-see L    | im Chý         | e Peov  | v vs. V                               | Vee Bo           | on Tek. |        |              |
| Conque                                                                                                                    | red or ceded co                | ountry-    | -what la       | w sup   | posed t                               | o be i           | n force | e      | 108          |
| Conserv                                                                                                                   | ancy Act XX                    | VII of 1   | 1856— <i>A</i> | Action- | -Limit                                | ation-           | plea i  | n de-  |              |
|                                                                                                                           | fault :—see S                  | ong San    | n vs. T        | he Mur  | icipal                                | Commi            | ssioner | 8.     |              |
| Constru                                                                                                                   | ction of Statut                | es-arre    | est of Ju      | dgmen   | t:—see                                | Reg. vs          | . 0—&   | F—.    | (            |
|                                                                                                                           | t, action to rec               |            |                |         | on-fulf                               | ilment (         | of :se  | e Oh   |              |
|                                                                                                                           | Wee Kee vs.                    | Kupper     | n Tomb         | у.<br>  | - A-                                  | ho               | nlied - | ishi-  |              |
| 51                                                                                                                        | a note signed<br>30 days or lo | 1 101 '' 3 | o picula       | or bel  | rober 10                              | ne sup           | buen a  | rithin |              |
|                                                                                                                           | a reasonable                   | uger at    | орион<br>      | rain C  | lillegni                              | ь о, ни<br>в & С | O. 234. | Khoa   |              |
|                                                                                                                           | Heng Team                      | -          |                |         | · · · · · · · · · · · · · · · · · · · | 0                | -,,     |        |              |
|                                                                                                                           | Tone Town                      | one ant    | •              |         |                                       |                  |         |        |              |

| Contract, Excise Act—repeal—contract void:—see Attorney General                                                                                                                      | page.  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| vs. Kam Kong Gay.                                                                                                                                                                    |        |
| a shipping order addressed to the Master of a Steamer and signed by Defendants without the word "Agents:"—Held they are personally liable:—see Fredericks and ors. vs. Dunlop & ors. |        |
| ,, breach of-labourers or workmen:-see Lamb vs. Ponen.                                                                                                                               |        |
| ,, Magistrate has jurisdiction to convict a labourer for a second                                                                                                                    |        |
| absenting upon the same                                                                                                                                                              | 66,93. |
| ,, in restraint of trade—Infancy—Lex loci—consideration:— see Schmidt and ors. vs. Spahn.                                                                                            | ,      |
| ,, plaintiff sues for money actually expended, not for damages for non-fulfilment of :—see Syed Noor and anr. vs. Green.                                                             |        |
| Contribution—joint tortfeasors—liability in equity: -see Knus vs.                                                                                                                    |        |
| Hogan.                                                                                                                                                                               |        |
| Conviction may be amended for an informality:—see Peter Duggie                                                                                                                       |        |
| vs. F. Gibbons.                                                                                                                                                                      |        |
| two offences under one penalty—mistake incurable:—see                                                                                                                                |        |
| The Opium Farmer vs. Khoo Boo An.                                                                                                                                                    |        |
| Coopan Chetty and anr. vs. Bain.—A suit for specific performance                                                                                                                     |        |
| of an agreement by a Principal, must be brought against him and not against the Agent who made the promise, or at                                                                    |        |
| all events he must be made a party to the suit because his                                                                                                                           |        |
| interest is above affected. Semble—An agreement to be                                                                                                                                |        |
| binding on the Principal must be in writing. If in such a                                                                                                                            |        |
| case the Agent is only made Defendant, a demurrer lies to                                                                                                                            |        |
| the bill. Query—Can an agreement to execute a Policy of                                                                                                                              |        |
| Insurance on a ship be enforced if the vessel is not sea-                                                                                                                            |        |
| worthy? Is it too late in such a case to pray for specific                                                                                                                           |        |
| performance after notice of ship being lost ?                                                                                                                                        | 170.   |
| ,, Chetty and anr. vs. Bain.—If a vessel on which a Policy of                                                                                                                        |        |
| Insurance has been effected, is not seaworthy at the begin-                                                                                                                          |        |
| ing of the voyage, the Policy never attaches, and no action<br>can be maintained on it even if the vessel be lost, and the                                                           |        |
| person effecting the Insurance had no notice of the vessel                                                                                                                           |        |
| not being seaworthy. It is not material in such a case to                                                                                                                            |        |
| enquire from what cause the loss has arisen                                                                                                                                          | 179.   |
|                                                                                                                                                                                      | 445.   |
| Courts, first Charter of Justice for the Courts of the Incorporated                                                                                                                  | TIU.   |
| Settlements introduced                                                                                                                                                               | 107.   |
|                                                                                                                                                                                      |        |
| " Requests jurisdiction balance of amount of exector                                                                                                                                 | 611.   |
| extent:—see Warne vs. Gaudart.                                                                                                                                                       |        |
| ,, Straits-jurisdiction-offences committed in the Malayan                                                                                                                            |        |
| Peninsula                                                                                                                                                                            | 610    |
| Crimes—in what manner repressed for the first 20 years after Penang                                                                                                                  | ,      |
| was occupied                                                                                                                                                                         | 73.    |
| Criminal Case-wife cannot be a witness for or against her hus-                                                                                                                       |        |
| band :- see Reg. vs. Lim Ah Weng.                                                                                                                                                    |        |

|                                                                                                                                                                      | page.   |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Damages—action for slander—not maintainable without proof of special damage:—see Rozells vs. Che Dean.                                                               | -       |
| Defective assignment of realty—volunteer:—see Shotamah vs. Kader<br>Meydin.                                                                                          |         |
| Depositions how to be taken—when admissible in evidence in the absence of a witness—(English Case)                                                                   | 595.    |
| Dickens, 1st Judge and Magistrate of Penang                                                                                                                          | 71,105. |
| Dogs, injuries by :- see Farquhar vs. Shellumbrum.                                                                                                                   |         |
| Ejectment—plea of former judgment—adverse possession:—see Ma-<br>homed Jonnoos vs. Saiboo.                                                                           |         |
| English Law in the Straits Settlements                                                                                                                               | 66.     |
| ., . , Penang (Privy Council Case)                                                                                                                                   | 569.    |
| Erasures and interlineations in an affidavit:—see Goh Un Chong vs. Yap Tong San.                                                                                     |         |
| ., in an executed deed:—see Kho Guan Chiat vs. Tan Giok                                                                                                              |         |
| Eviction, meaning of                                                                                                                                                 | 219     |
| ,, leave and license :- see Mahomed Juso vs. Khu Sek Chuan.                                                                                                          |         |
| Evidence in reply—prosecution closed—defence still going on :see Ong How vs. Abdulrahman.                                                                            |         |
| Exise Act—contract under a repealed Act:—see Attorney General vs.  Kam Kong Gay.                                                                                     |         |
| False Imprisonment—arrest on suspicion of felony—prosecution to commence within three months:—see Mahomed Dris vs. Scott.                                            |         |
| ,, ,, arrest in Church: -see Adley vs. Robertson.                                                                                                                    |         |
| ,, ,, cruelty in a lock-up :- see Mootoosamy vs. Robertson.                                                                                                          |         |
| ,, ,, deportation: -see Mat Pah Ali and his wife vs. Robertson.                                                                                                      |         |
| ., ,, flogging a coolie:—see Vellayadan vs. Wilson.                                                                                                                  |         |
| , by a Police Officer—proof of malice necessary:—see Koh Boo<br>An vs. Pungulu Shaik Benan,                                                                          |         |
| Farquhar vs. Shellumbrum and two others.—A buffaloe is not ferce                                                                                                     |         |
| naturee but is a domestic animal mansuetee naturee. The owner of an animal mansuetee naturee is not liable for an injury done by it, unless he knew its vicious pro- |         |
| pensities, and such knowledge must be alledged in the declaration and proved at the trial. The Court will not                                                        |         |
| infer negligence on the part of a defendant by the mere                                                                                                              |         |
| happening of an accident, as that defendants' buffaloe was                                                                                                           |         |
| found in plaintiff's land without a stick on its horns. If                                                                                                           |         |
| animals ordinarily kept in confinement or control as horses, cows, (but not such as are generally suffered to go at large,                                           |         |
| like dogs) trespass upon the property of another, the owner is liable for the trespass and the ordinary consequences of                                              |         |
| the trespass, and it is perfectly immaterial whether the                                                                                                             |         |
| animal escapes by reason of negligence of the owner or in                                                                                                            |         |
| spite of his most diligent care                                                                                                                                      | 222     |
| Patimah and ors. vs. Daniel Logan and orsA Clause prohibit-                                                                                                          |         |

page.

ing the devisees and legatees from "proceeding to law in any Court or Courts for their said shares" under the pain of losing their legacies, is void, as being repugnant and inconsistent with the gifts, as property is inseparable from the right to institute legal proceedings, and the protection of the law.

If a testator gives certain personal property, (naming them) to legatees, and in a subsequent part of his Will he gives the whole of his personal property to his Executors upon certain trusts, such latter part will not prevail over the former as being irreconcilable with it on the principle that it denotes a subsequent intention, as this rule only applies on the failure of every attempt to give to the whole such alconstruction as will render every part of it effective; and the general terms of the latter shall not be held to control the distinct terms of the former.

A testator having devised 11 pieces of land in P. particularly described in his Will to Trustees, directed that the lands should be called the "Whahkoff of M. N." and he further directed his Trustees out of the rents and profits of the said lands to pay for ever the sum of \$ 20 monthly to the managing body of a School in Chulia Street, Penang, also the sum of \$ 60 monthly to the petitioner T. C. M. and her lawful issue during their natural lives, the sum of \$ 40 monthly for the maintenance of one of his sons and his wife. The testator then gave the residue of the said devised premises upon trusts as follows :-- " to expend for the yearly performance of Kandoories and entertainments for me and in my name to commence on the anniversary of my decease according to the Mahamedan religion or custom, such Kandoories and entertainments to continue for ten successive days every year, and also in the performance of an annual Kandoorie in the name of all the prophets, and to expend the same in giving a Kandoorie or feast according to the Mahomedan religion or custom to the poor for ten successive days in every year from the anniversary of my decease, to the extent of three hundred dollars, including the costs of lighting up the Mosque or burial place of my deceased mother and the schoolrooms thereto adjoining. And also to give Kandoories or feasts to the poor as aforesaid, once in every three months to the extent of one hundred dollars, and provided there should remain any surplus monies then the same, is to be expended in purchasing clothes for distribution to the poor,"-HELD (firstly) that the trust for the school was a good charitable gift, and therefore valid .- HELD (secondly) that the gift to T. C. M. and her issue was a gift to her for life, for her sole and separate use, with remainder to such of her children as were in existence at the time of the testator's

page.

death as joint tenants for life. That the word "issues" was used in the sense of "children," and was a word of purchase and not of limitation, and as the gift was only for life, the children born after testator's death could not be let in—Held (thirdly) that the gift of the residue of the rents, and profits for Kandoories &c. was not a charitable gift but void as tending to a perpetuity.—Held (fourthly) that the gift for clothes to the poor was a good charitable gift, and as the amount of the surplus monies with which it was to be paid, was sufficiently certain, the gift of the surplus was valid.

the testator directed the rents, and By a clause, profits of his estates, after deducting the expences of collection and management, to be divided into twenty four shares, which shares were to be held upon trust for the benefit of his children thereafter named and The testator then proceeded to distribute their issues. these twenty four shares amongst his children and grandchildren in certain proportions, and finally directed as follows:-" I direct that the annual income of the said share or shares so set apart for my said sons and grandsons and their respective issues in the said trust estate and premises shall be paid to the same son or grandson during his life, and from and after his decease that his said share or shares shall be held in trust for all such ones born in his lifetime at such ages and times as he may by any writing under his hand or by his Will appoint, and in default of such appointment &c. in trust for all his children who being a son shall attain the age of twenty one years or being a daughter shall attain that age or marry in equal shares and if then there shall be but one such child, the whole to be in trust for such child."-HELD that it was not void on the ground of remoteness.

A testator by his Will gave a legacy to M. N. and his issue, and directed that in case he died without issue his share was to go to A. C. J. and R. B. and their issues in equal shares. He also gave a legacy to A. C. J. and directed that in case he died without issue his share was to go to M. N. and R. B. A. C. J. having died in the lifetime of the testator without issue:—Held that the words "die leaving no issue" apply to death in the testator's lifetime and that the gift to A. C. J. did not lapse, but the ulterior gift took effect as a simple absolute gift.

A testator by a portion of his Will devises his lands situate at A. and T. for certain purposes, and in a subsequent part of his Will he devised the rest and residue of his estates at P. and P. W. or elsewhere (exclusive of those which he had by deed of gift given to his children and grandchildren) "for certain

,11

page. other purposes :- Held that these two clauses were not inconsistent, as the words "rest and residue" execluded what the testator had already given, and the effects of these 288. words were not effected by the parenthetical clause ... Fitting out an expedition to recover lost property at sea-salvage :see Brown and ors. vs. Duncan. out an expedition-legality of agreement-salvage :-- see Brown and ors. vs. Hay. Five feet pathway-thoroughfare :- see Lim Seang vs. Vaughan and ors. Flogging, assault, and imprisonment: -- see False Imprisonment. Foreign country, offences committed in a :- see The Queen vs. Eman. and Ho Ghee Sew vs. Nakodah Mahomed. Sovereign cannot be sued in our Courts:-see Nairne vs. The Rajah of Quedah. Form of acknowledgment to deeds of married women 261. Fredericks and ors. vs. Dunlop and ors.—A Shipping Order to the following effect "To the Commanding Officer of the S. S. "T." Please receive on board 100 Tons tin for L. @ 3/10 per 20 cwt." signed by the Defendants and given to Plaintiffs :- Held a binding contract on both parties and that parol evidence to shew that Defendants contracted merely as Agents was not admissible and inasmuch as the "T." through the default of the owners, the Defendants principals, did not arrive whereby the goods could not be sent by her but had to be sent by another vessel, the Defendants were personally liable for the breach of the contract. Sen-BLE.—The measure of damages in such a case would be the difference between the two rates of freight or otherwise according to circumstances, and if no actual loss was sustained by Plaintiffs they would be entitled to nominal damages 369. only ' Freight-Charter-party-Shippers-Ship-owners'lien :-- see Boustead and ors. vs. Clarke and ors. right of Master to detain gooods until freight is paid :- see Guthrie and anr. vs. McKie. Gambling, conviction against house owner: -- see Appeal. found therein :- see Appeal, and Song Sam vs. The Municipal Commissioners. limitation-Conservancy Act XXVII of 1856-money had and received-default in plea :- see Song Sam vs. The Municipal Commissioners.

Goh Un Chong vs. Yap Tong San .- An affidavit which contains erasures and interlineations which are not initialed by the Commissioner before whom it was sworn, cannot be read: as such erasures and interlineations must be presumed to have been made after the affidavit was sworn, as otherwise they would have been duly noticed by the Commissioner. A Writ of Sequestration issued against the property of a

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | page.        |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| defendant will be set aside with cost as against a judgment<br>debt due to another creditor of the same debt, although such<br>judgment be recovered in a Court inferior to the Court<br>from which such Writ of Sequestration issues                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 245,         |
| Goods seized in the custody of the Law:—see Baumgarten vs. Kraal.  ", sold by sample—Memo. of sale is silent as to sample:—see Lorrain and ors. vs. Neo Leang and ors.  Guthrie and anr. vs. McKie.—By a Bill of Lading for goods shipped, "Freight to be paid here one month after sailing, vessel lost or not lost," the shipowner or master does not lose                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |              |
| his lien for freight unpaid, although credit is thus allowed<br>and a fixed and distant day named. The mere making of<br>an agreement for freight, does not exclude the right of lien,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 414          |
| unless its terms are clearly inconsistent with such a right Hajee Mahomed Arsad vs. Dunlop.—In a case against the owner of a house for permitting it to be used as a Common Gaming House under Ordinance XIII of 1870(now Ordinance IX of 1876) and in which certain appliances mentioned in Sect.  15 are found—nothing but a mere presumption arises against him that it was so used by his permission, which he may rebut by evidence. The Magistrate must be satisfied                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 414.         |
| of the defendants "guilty knowledge," before he can convict Halleemah vs. Bradford.—The Indian Act XX of 1837, which has altered real property to chattels real only refers to the transmission of such property but does not alter the nature of it. A Mahomedan husband takes no interest in his wife's                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 441.         |
| freehold property during the lifetime of his wife or after her decease by virtue of the coverture                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 383.         |
| Halleemah vs. Noordin.—Interest allowed on a Promissory Note payable on demand from the date of such note; if the note contain a stipulation as follows:—"With Interest at 12 o/o per annum until payment"                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 277.         |
| Hawah vs. Daud.—Mahomedan married woman's personalty is her own                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 2111         |
| separate property and does not belong to her Mahomedan<br>husband by Marital right. The Mahomedan Law considered                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 253.         |
| Highway—user—intention of owner to dedicate—trustee—plea—private right of way:—see The Municipal Commissioners vs. Tolson.  Ho Ghee Sew vs. Nakodah Mahomed.—A party wishing to proceed here against another for an offence committed by the latter in a Foreign State must proceed under the Acts I of 1849                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |              |
| and 7 of 1854 and the information for a warrant to apprehend such latter person for such offence must comply with the provisions of those Acts and must disclose such facts as to bring the case within the Acts, otherwise such person cannot be proceeded against for want of jurisdiction. If a Magistrate after granting a warrant afterwards finds he has acted illegally by exceeding his jurisdiction, he can order such warrant not to be proceeded with even if it be issued and is at the time in the hands of the Police                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <b>36</b> 6. |
| STREET IN ALL DIES DITTIES HIS LIGHTING OF DIES WAS A COMMON OF THE COMMON AND ADDRESS OF THE COMMON ADDRESS OF THE COMMON AND ADDRESS OF THE COMMON ADDRESS O |              |

|                                                                                                                                                                                                                                     | page.          |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Horse or cow, injuries by :— see Farquhar vs. Shellumbrum,<br>House built of inflammable material within the limits of the Town :—                                                                                                  |                |
| see. Reg. vs. D'Oliveiro.                                                                                                                                                                                                           |                |
| Husband and Wife cannot be a witness for or against each other in a criminal case:—see. Rrg vs. Lini Ah Weng.                                                                                                                       |                |
| Indecent exposure—common nuisance—public place—(English case)                                                                                                                                                                       | <b>6</b> 98.   |
| Infant, not allowed to choose its own guardian : set In the matter of Cheah Ah Koop.                                                                                                                                                |                |
| contract by —at what age it ceased to be—not a fraud—<br>Court will not estop him from applying to set aside such<br>contract:—see Mah Keow vs. Cheah Hit.                                                                          |                |
| Injuries by animals—knowledge of owner—mansustæ naturæ— feræ naturæ:—see Farquhar vs. Shellumbrum.                                                                                                                                  |                |
| In re the Brig Freak.—A person who captures a ship and goods from a pirate, has no right to detain them as against the owners. One sixth of the value of the ship, cargo and freight saved, is a fair compensation in such a case   | <b>3</b> 0.    |
| Insurance—specific performance—principal and agent—demurrer:— see Coopan Chetty vs. Bain.                                                                                                                                           |                |
| ., unseaworthiness—cause of loss immaterial:—see Coopan<br>Chetty vs. Bain.                                                                                                                                                         |                |
| In the Goods of Abdullah — Will of a Mahomedan alienating the whole of his property (although by the Mahomedan Law he can only alienate one third) is good pro tanto. The administration granted by the Court to the widow revoked, | غم شد<br>غم شد |
| and the Will admitted to Probate                                                                                                                                                                                                    | 16.<br>281.    |
| ,, of Chu Siang Long.—Adopted child of a Chinese entitled to joint administration (overruled)—distribution when two                                                                                                                 |                |
| ,, ,, of Choa Chong Long (overruled by Choa Cheew Nech vs.                                                                                                                                                                          | 460.           |
| Spottiswoode)                                                                                                                                                                                                                       | 417.           |
| ,, ,, of Galastaun.—The proper execution of a Codicil according to the Indian Wills Act XXV of 1838 is sufficient to support the Will to which it refers, although the Will be not proper-                                          | ,              |

| ly executed, if the Will and Codicil be written on the same paper, or be annexed to each other, and the witnesses attest-                                                                                                                                                                                                                                                                                                                                                                                                                                                              | page.         |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| In the Goods of Khoo Chow Sew.—The Statutes, 31 Edw. III c. 11, and 21 Henry VIII c. 5, which give a widow a right to administration extend to the Straits; and although under these Statutes the Court has a discretion, yet, this discretion in general is given in favour of the widow, unless good grounds are shewn for departing from it. The judge of the Supreme Court has the same powers as the Ordinary mentioned in these Statutes. The words "next of kin," in the Charter                                                                                                | 26.           |
| and Ordinance, are not to be construed too strictly  of Khoo Chow Sew.—The rule in England that the Administration Bond must be double the value of the estate, is not a complete guide here, as property here is treated as                                                                                                                                                                                                                                                                                                                                                           | 310.          |
| personalty                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 31 <b>3</b> . |
| the Intestate's property. The law of China considered of Shaik Emam.—Probate granted to copy of a lost Will there being sufficient evidence, of the existence of the origi-                                                                                                                                                                                                                                                                                                                                                                                                            | 418.          |
| nal Will after the death of the testator  In the matter of Ahamado Bawa.—The first part of the 40th Sect. of Act V of 1868 (the Supreme Court Ordinance) on the pring ciple "Expressio unius est exclusio alterius," must be read as if it excluded all persons not specifically mentioned therein. The words "persons of good repute" in the second part of the Section must be construed strictly, and it is ne- cessary for an applicant under that part of the Section,                                                                                                            | 278.          |
| above all things, to give by the evidence of others, the most unexceptionable certificates of character                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 433.          |
| In the matter of Cheah Ah Koop.—An infant of 8 years of age will not, at least against the father, be allowed to choose its                                                                                                                                                                                                                                                                                                                                                                                                                                                            |               |
| guardian  of Halemah and Haminah.—The pledging a child as security for debt is invalid, as being against public policy (although it might have been valid in the country where its was made) and the parents might at any time have the child returned                                                                                                                                                                                                                                                                                                                                 | 323.<br>308.  |
| to them by Habeas Corpus                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 79,84.        |
| Intestate's Estate—Legitimacy—right of succession to, see Administration, and In the Goods of &c.  Jemadar Sabtu vs. Virtashellum.—An instrument in the following terms, "Received from J. S. 200 Dollars on account of a piece of land sold by me to him, measuring fifty long and about four hundred feet wide," signed by the defendant, and having an agreement stamp on it, is a sufficient note or memorandum in writing to satisfy the Statute of Frauds, on which a Court of Equity will decree specific performance. The word "fifty" in such instrument agrees with the sub- | 10,0%.        |
| stantive "feet" subsequently mentioned, and must mean                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |               |

| fifty feet. Extrinsic evidence is always admissible to shew what is the property which is the subject of the contract as such evidence does not vary or contradict the instrument,                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | e.       |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| but merely applies it to its subject. SEMBLE—Part payment of the purchase money is not a sufficient part performance to enable a Court of Equity to enforce the specific performance of a verbal contract                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 1.       |
| Jettison of cargo—unseaworthy—fault of Master in storing—damage not by sea peril:—see Khu Teen vs. Shiramaleh Merican.  Jurisdiction, Court can have no—if cause of action arose abroad and defendant is also abroad:—see Khu Poh vs. Wan Mat.                                                                                                                                                                                                                                                                                                                                                                                                                 |          |
| Justice was not administered according to English Law although                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |          |
| there were Courts and Judges before the Charter 72                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 2.       |
| Kader Meydin vs. Shatomah.—A Mahomedan married woman must<br>in accordance with Indian Act XXXI of 1854 acknowledge<br>all assignments of her realty situate in the Colony, and hus-                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |          |
| band must join in such assignments or his absence accounted for 260                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Λ.       |
| Kho Guan Chiat vs. Tan Giok LanA deed or contract, and an in-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <b>.</b> |
| strument not under seal should not be altered after being signed and executed, any erasure or alteration made sub-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |          |
| sequently, will vitiate the contract 250                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 6.       |
| Khouse Miah Malim vs. Anamaleh ChettyTo support the count                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |          |
| for use and occupation there must be a contract between                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |          |
| the parties, express or implied. An action of trespass for •                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |          |
| mesne profits cannot be sustained if the plaintiff has not en-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | -        |
| tered on the premises 238                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | b.       |
| Khu Poh vs. Wan Mat.—This Court can have no jurisdiction in a case where the cause of action arose abroad and the defendant is also abroad. A vessel having certain goods of the plaintiff on board, was wrecked off a foreign country where the defendant took possession of them and sent the same to Penang. He himself though born here but had for sometime past ceased to reside here. In an action of Trover against him for the goods in which the plaintiff proceeded by Sequestration and heard ex-parte:—Held, that the defendant being abroad, and the cause of action arose abroad, the Court has not jurisdiction to deal with it and the plain- |          |
| tiff was nonsuited 24                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 7        |
| Khu Teen vs. Shiramaleh Merican.—If a jettison of cargo becomes                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |          |
| necessary in consequence of any fault or breach of contract on the part of the owner or master, such as the vessel being in an unseaworthy condition, such jettison is attributable to that fault or breach of contract, and not to sea peril, though that also may be present and enter into the case and the owner or master must bear such loss. If a cargo on board is damaged in a storm by the negligence of the master or crew in storing or keeping by the same, such as the hatches                                                                                                                                                                   |          |
| not being properly secured, such loss or damage falls on                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |          |

| Kidnapping-damages for plaintiff:-see Mat Pah Ali and his wife                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | page. |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| vs. Robertson.  Knus vs. Hogan:—A Court of Law will not imply a contract to contribute between two persons (tortfeasors) who are ordered to pay a sum of money by either a Court of law or equity.  Semble;—But a Court of Equity would, as contribution does not, in equity, depend upon contract, but is founded on general principles of natural justice                                                                                                                                                                                                                                                                                                        | 173.  |
| Koh Boo An vs. Pungulu Shaik Benan.—In an action against a constable or against a person acting under Act XIII of 1856 or XLVIII of 1860, (now under Ordinance I of 1872) it must be distinctly and clearly stated in the declaration, and proved at the trial that the defendant acted maliciously and without reasonable or probable cause. If there is any failure in this respect, judgment must be for the defendant. So in an action against a Pungulu for assault and imprisonment the plaintiff clearly proved the assault and imprisonment and also that defendant acted without reasonable or probable cause but failed to prove malice on his part, the | 202   |
| defendant had judgment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 309.  |
| Stamps are not now used on documents the present Stamp Ordinance VIII of 1873 cancels the practice)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 276.  |
| Lamb vs. Ponen.—Certain persons entered into a contract for labour, but just 6 days before the expiration of the term refused to work any further and were summoned before the Magistrate but were brought up after the expiration of such term.—Heldon appeal, that the Magistrate had jurisdiction under the Act XIII of 1859, to order the men to return and work out the 6 days and also for such other times                                                                                                                                                                                                                                                  | on m  |
| they had refused to work                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 377.  |
| Law Civil and Criminal, not in existence before the Charter, suits determined according to law of nature by those who administered them                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 72.   |
| ,, of China and local custom as to guardian for marriage:—see Nonya Siu vs. Othmansah Merican.  of China considered:—see In the Goods of Loa Leong An.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |       |
| of England in the Straits Settlements                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 66.   |
| of Penang to date from 1807, Singapore and Malacca from 1826                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 109.  |
| Law Seow Huck vs. The Spirit Farmer,—It is not absolutely neces-<br>sary for the Spirit Farmer before suing under Section 37 of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |       |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | page. |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Excise Ordinance IV of 1870, to enter into the place of the defendant where the Spirituous Liquors are stored, and to inspect the same; but he may sue under such Section, on the accounts rendered him by the defendant as the words "on search duly authorized," in such Section, mean the inquiry or demand given him by the preceding Section                                                                                                                                                                                                                                                                      | 949.  |
| Legatees—marriage—presumption—custom—trustees—trust not de-<br>clared—beneficial estate—restraint on alienation—power<br>to lease—direction to lend money—power to renew same—<br>family burying place—charity—perpetuity:—see Ong Cheng<br>Neo vs. Yeap Cheah Neo and ors.                                                                                                                                                                                                                                                                                                                                            |       |
| Letters Patent of 1807 constituting a Supreme Court for Penang withdrew the inhabitants from the jurisdiction of the Calcutta Supreme Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 110.  |
| Lim Bee vs. Jadee.—Seizure and detention of Plaintiff's boat and arms—right of defendant to seize—suspicion of piracy—illicit chandoo—defendant's responsibility ceased after being brought to the nearest Magistrate before trial—judgment for defendant                                                                                                                                                                                                                                                                                                                                                              | 41.   |
| Lim Chye Peow vs. Wee Boon Tek.—Suit on the Civil side by a Chinese wife for restitution of conjugal rights. Plea to the juris-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |       |
| diction:—Held, that the Supreme Court has no jurisdiction                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 282.  |
| Limitation—Conservancy Act XXVII of 1856—default in plea:—see Song Sain vs. The Municipal Commissioners.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |       |
| Lim Seang vs. Vaughan and ors.—Trespass by breaking 5 feet pathway—thoroughfare—judgment for defendants                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 54.   |
| Lim Sun Poh vs. Lim Kin.—A conveyance of land by an Administrator who is also appointed Executor, in a concealed Will, is binding on the other Executor, provided the deed purports to convey not only his estate as Administrator, therein, but the fee absolutely without reference to his character of Administrator, or other qualification. The word "Administrator" in such deed is merely descriptive of the party conveying. Query.—Will an action lie at the suit of                                                                                                                                          | 239.  |
| one, out of several executors, the other being alive?  Lions, bears and monkeys, injuries by—liability of owner:—see Farquhar vs. Shellumbrum.                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 405.  |
| List of unrepealed Ordinances                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 604.  |
| Lorrain and ors. vs. Neo Leang and ors.—If A sells goods to B, and the Memorandum of sale is silent as to whether the sale is by sample or not, parol evidence is not admissible to shew that it was a sale by sample. In the case of a sale of damaged goods the maxim caveat emptor applies as by the terms of the bargain, the purchaser has notice of the defect and has an allowance made him for it, and it is his own fault if he does not sufficiently protect himself against the risks incidental to such a purchase. In all cases where the purchaser is satisfied without requiring a warranty, in the ab- |       |

page. sence of fraud he must bear the risk. Where goods are sold by sample, and on idelivery but before acceptance they are found not to correspond with the sample the purchaser might in that case, if the right of property has not passed to him, be justified in returning the goods 271. Lorrain Gillespie and Co. vs. Khoo Heng Team and anr. - A, bought and sold note, thus, "20 or 30 piculs white pepper within 30 days or longer at option, of purchasers," signed by plaintiffs and defendants respectively, is a good note so as to satisfy the 4th Section of the Statute of Frauds (29 Car. 2. 280. Magistrates of Penang, Province Wellesley and Singapore; the Commissioner of Court of Requests Singapore; and Registrars of Penang and Singapore and their Snr. Swn. Clerks appointed ex officio permanent Commissioners to take the acknowledgments of deeds of married women ... ... ... 260.428. Mahomed Dris vs. Scott.—An action of false imprisonment will not lie against a Police Officer for arresting a person whom he suspected of having committed a felony. The law will protect him if he had acted bona fide and in the honest belief that he had authority to do so. Any action or prosecution which may be brought against a Police Officer should be commenced within 3 months after the act complained of ... 145. Mahomed Joonoos vs. Saiboo .- In an action of trespass to land the defendant claimed the land as his own freehold but just as the case was called on for trial he consented to judgment for the plaintiff. He afterwards brought an action of ejectment against the then plaintiff who pleaded the judgment in the action of trespass as an estoppel:-Held, that as the judgment in the action of trespass being by consent it amounted to nothing more than a judgment by default and was not therefore an estoppel. An agreement not under seal by a joint tenant selling his moiety and to make a conveyance at a future day (for which moiety he has received his money) does not sever the tenancy, and there is survivorship. The Statute, 8 and 9 Vict. ch. 106, does not extend to the Twelve years uninterrupted possession of land, is by the Indian Statute of Limitations XIV of 1859, sufficient to maintain an action of ejectment for the recovery of such 359. land ... Mahomed Juso vs. Khu Sek Chuan.-If a lessee is in arrears of his rent and the lessor serves on him a notice to quit or to pay extra rent for the time he stays on the premises, and afterwards threatens to seize and distrain if he does not leave the premises, and the lessee in compliance with these demands voluntarily quits the premises, these circumstances

will not amount to an eviction so as to entitle him to maintain an action against the lessor for breach of covenant in a lease for quiet enjoyment; but such circumstances amount

| to a leave and license by the lessee to the lessor to enter on                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | page.    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| such premises which is an answer to the action                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 219.     |
| Mah Keow vs. Cheah HitIf an infant, knowing himself to be un-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |          |
| der 21 years of age, enters into a contract, but is ignorant,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |          |
| at what age a person is said by law to cease to be an infant,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |          |
| and is accordingly silent as to his age, by which the person                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |          |
| with whom he contracts, is deceived; that is not a fraud on                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |          |
| his part which will estop him from applying to a Court of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | ,        |
| Equity to set aside such contract. The defence of being a purchaser for valuable consideration without notice, cannot                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |          |
| be set up, unless such defence is specially set up by way of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |          |
| answer or plea. SEMBLE.—An infant is entitled to apply to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |          |
| a Court of Equity to set aside his contract, even if he ob-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |          |
| tained a benefit thereby                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 364.     |
| Mahomedan Law-wife's personalty is her own separate property:-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | ,        |
| see Hawah vs. Daud.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |          |
| Mahomedan husband takes no interest in his wife's freehold property before or after her death:—see Halleemah vs. Bradford.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |          |
| There is no to the contract of | 106,110. |
| , a Factory, subject to the jurisdiction of Calcutta Supreme Court                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 107.     |
| " and Singapore united to Penang                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 87,110.  |
| ,, lands:—see Sahrip vs. Mitchell                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |          |
| Malkin (Sir Benjamin), the most scientific and logical of the Recorders                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 24,97.   |
| Marriage of a Chinese female after divorce:—see Nonya Siu vs.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |          |
| Oothmansah Merican.  Married women to acknowledge deeds of sale before Commissioners                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 960 499  |
| Martial Law, crimes repressed by, for first 20 years after Penang                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 200,420. |
| was occupied                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 73.      |
| Master discharging a servant without just cause :- see Miang vs.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |          |
| Kugleman.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |          |
| Mat Pah Ali & his wife vs. Robertson.—False imprisonment and de-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |          |
| portation—Judgment for plaintiffs                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 132.     |
| Maxwell vs. Chittyappah Chitty.—Mortgage of a Hackney carriage                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |          |
| not in a regular form—agreement to sell is not stated—Sale<br>by Mortgagee upheld. Judgment for defendant                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 267.     |
| Miang vs. Kugleman.—If a person contracts to serve another as a                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 201.     |
| servant by the month, and leaves it, without notice, he will                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |          |
| not be entitled to recover any wages for that month. If a                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |          |
| master discharges his servant without just cause, the master                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |          |
| will be liable for such wages, even if the servant had served                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |          |
| only one day                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 447.     |
| Monkeys, lions, and bears, injuries by :- see Farquhar vs. Shel-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |          |
| lumbrum.  Mootoosamy vs. Robertson.—Arrest and false imprisonment—star-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |          |
| vation in a lock-up-Police Charge Sheet-subsequent                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |          |
| entry—detection—Judgment for plaintiff                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 113.     |
| Mortgage bond-no money passed-made to defeat creditors:-see                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |          |
| Arnashellum Chetty vs. M. N. Merican.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |          |
| registration of—illegality—fi fa—liability of purchaser from                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |          |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |          |

page.

Mortgage - personal property—sale by Mortgagee upheld:—see Maxwell vs. Chitty: ppak Chitty.

Municipal Commissioners vs. Tolson.—In every case of highway the facts must be such as are sufficient to shew that the owner meant to give the public a right of way over his soil before dedication by him will be presumed, user alone, for however lengthened a period, is not conclusive, and it may be rebutted either by facts showing that it was not the intention of the owner to dedicate or by showing that owing to the state of the title, dedication was impossible

In order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an intention to dedicate, an animus dedi candi, of which the user by the public is evidence and no more

It is not enough to establish the right of the public that the persons using the way reasonably believed from the conduct of the owner, that they acquired a right to it, an actual intention on the part of the owner to dedicate must be shown. Prima facie there is reason to think that a landing place leading from the sea to a public highway would be also a highway, but such inference is not absolutely necessary, and it might be rebutted by evidence shewing that it could not have been dedicated as a highway or that it was in fact not dedicated.

Trustees of land for some special purpose inconsistent with its use as a public highway, have no power and are incapable to make a dedication.

A highway may be dedicated with obstructions or impediments which if made in an existing highway would be a nuisance, but if the defendant by his plea claims a whole close to be a highway, he must prove a dedication of the whole as a highway or he has failed to make out his case.

A private right of way will be presumed after several years user, over land granted for some special purpose consistent with its use as a private right of way.

To an action of trespass for breaking down two boards placed against defendant's gates, defendant pleads private right of way as to both, and proves this right only as to one:—Held, that he had failed to establish his case, and the plaintiff must have judgment ... ... ... ... ... ... ... ... ...

323,

Murder committed by a person in a foreign country—trial:—see Reg. vs. Eman.

Native headmen or captains appointed to administer justice in certain

72,95.

Nairne vs. The Rajah of Quedah and Wan Ismail.—A Foreign Sovereign although a natural born subject by our peculiar law, cannot be sued in our Courts if he has not acted or done anything by which it might be inferred that he acted as a subject. Query.—Can a person be considered a subject after he has been recognized as an Independent Sovereign?

| •                                                                                                                             |          |
|-------------------------------------------------------------------------------------------------------------------------------|----------|
| SEMBLE.—In a suit against such a person it is not necessary                                                                   | page.    |
| to state in the declaration or bill, that he is amenable to the                                                               |          |
| Court's jurisdiction, as this is a matter that should come                                                                    |          |
| from the other side; and if the plea does not say he is a                                                                     |          |
| Sovereign and as such is exempt from the jurisdiction of this                                                                 |          |
| Court it must be presumed that he is not one                                                                                  | 151.     |
| Neutrality, breach of, order of Government :- see Ab Dorahim vs.                                                              | ,        |
| Newbold.                                                                                                                      |          |
| New trial-Court refused to grant, if granted it will open a door to                                                           |          |
| fraud and perjury:—see Thompson vs. Puah Toh.                                                                                 |          |
| Nonya Siu vs. Oothmansah Merican.—Subsequent marriage by Chi-                                                                 |          |
| nese females in this Colony, after divorce, valid. The law                                                                    |          |
| of China and the local custom as to guardian for marriage                                                                     |          |
| considered                                                                                                                    | 167.     |
| Notification, Officers to take acknowledgments of deeds of married                                                            |          |
|                                                                                                                               | 260,428. |
| , Transfer to the Colonial Office                                                                                             | 420.     |
| ,, Title of Recorders altered                                                                                                 | 420.     |
| Nuisance-indecent exposure-public place (English case)                                                                        | 598.     |
| Offences committed in a foreign country :- see Reg. vs. Eman, and                                                             |          |
| Ho Ghee Sew vs. Nacodah Mahomed.                                                                                              |          |
| Oh Wee Kee vs. Kuppen Tomby In an action to recover a penalty                                                                 |          |
| on an agreement for a breach of it, the plaintiff is entitled                                                                 |          |
| to recover the damages actually sustained, if the amount                                                                      |          |
| sued for is of the nature of a penalty and not of liquidated                                                                  |          |
| damages. The damages in such case will not exceed the                                                                         | 7.04     |
| penalty named in the agreement                                                                                                | 164.     |
| Ong Cheng Neo vs. Yeap Cheah Neo.—If a testatrix directs as to<br>the remainder of her real and personal property not already |          |
| disposed of, that her Executors shall receive and collect the                                                                 |          |
| same from all persons whatever and in such manner as to                                                                       |          |
| them may seem proper, and directs that they, their heirs,                                                                     |          |
| successors, representatives or descendants, may apply and                                                                     |          |
| distribute the same, all circumstances duly considered in                                                                     |          |
| such manner and to such parties as to them may appear                                                                         |          |
| just, and by the other parts of her Will she disposed of the                                                                  |          |
| rest of her property upon trust :- HELD, that the Executors                                                                   |          |
| took this property not beneficially but upon trust and inas-                                                                  |          |
| much as the objects of the trust were not declared it results                                                                 |          |
| for the benefit of the next of kin of the testatrix. A direc-                                                                 |          |
| tion that a house should be used as the "family" residence, and should not "be mortgaged or sold" without naming any          |          |
| fixed time, or explaining the word "family," is void for un-                                                                  |          |
| certainty, and being in restraint of alienation, and tending                                                                  |          |
| to a perpetuity. A direction in a Will to leave to two of                                                                     |          |
| Executors four houses of the testatrix for the period of 40                                                                   |          |
| years from the day of the testatrix's death at the rent of                                                                    |          |
| \$ 100 per mensem, is a good trust. So is a direction to                                                                      |          |
| lend a sum of money to certain persons at a certain in-                                                                       |          |
| terest for the same period, and the interest as it becomes due                                                                |          |
|                                                                                                                               |          |

| •                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | nage.   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| to become part of her trust estate. So is a direction to renew the same from time to time after the expiration of the period mentioned at such rent and rates of interest as the Executors or their heirs &c. might think fit.  A direction that two pieces of land of the testatrix on which the graves of her family are placed shall be reserved as the family burying place and shall not be mortgaged or sold, is not a charity but void as in perpetuity. A direction that a house should be built for performing religious ceremonies to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | page.   |
| the memory of the testatrix and her husband, is not a chari-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 314.    |
| ty, but void as tending to a perpepuity                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 314.    |
| the defence was going on:—Held, that this gave the less objection to the evidence being admitted                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 354.    |
| Ong Pak Ong vs. Tan Boon Teng.—If the case stated by a Magistrate under the Appeal Act is not transmitted to the Court within 6 days after the appellant has received the same according to the Act, the case is dead, and must be struck off, and                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | ٧٠      |
| it cannot be revived                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 348.    |
| Opium Farmer vs. Koh Boo An.—The Court will not restrain a Ma-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |         |
| gistrate from hearing a case simply on the ground of a strong bias of the Magistrate against the party applying; as                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |         |
| by doing so, it would throw discredit on the Magistrate  vs. Khoo Boo An.—A conviction of two offences under one penalty is bad—on appeal it was quashed. The Court will                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 278.    |
| not order it to be amended as the mistake was incurable  Order of Government—trespass—neutrality—breach between two belligerent chiefs:—see Ab Dorahim vs. Newbold.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 279.    |
| Ordinances, list of unrepealed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 604.    |
| Penalty—recovery of—breach of contract:—see Oh Wee Kee vs. Kuppen Tomby.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |         |
| Penang a desert island—4 Malay families upon it when ceded                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 68,104. |
| ,, under the Calcutta Supreme Court in 1800—13 Geo. III c. 63, s. 14 and 36                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 107.    |
| Personalty of a Mahomedan married woman is her own separate property:—see Hawah vs. Daud.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 2011    |
| Peter Duggie vs. Gibbons.—A mere informality in the drawing of a conviction is no ground for quashing it, if the evidence                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |         |
| CONTROLLED TO TO CLOSE AND AND ALL AND |         |

|                                                                                                                                                                                                                                                                                                                                                                 | ma ma   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| bears, out the case. An informal conviction may be can-                                                                                                                                                                                                                                                                                                         | page.   |
| celled and arl amended one sent up                                                                                                                                                                                                                                                                                                                              | 125.    |
| Pia Cherai Buri vs. Syed Abbass.—Use and occupation of lands be-<br>yond jurisdiction of Court—contract—ratification—con-                                                                                                                                                                                                                                       |         |
| structive occupation—action for rent—judgment for plaintiff.                                                                                                                                                                                                                                                                                                    | 48.     |
| Pirate—goods captured from a—compensation—no right to detain against owners                                                                                                                                                                                                                                                                                     | 30, 4   |
| Pledging a child for debt—void:—see In the matter of Halleemah and Haminah.                                                                                                                                                                                                                                                                                     | ,       |
| Polygamy amongst Mahomedans recognized                                                                                                                                                                                                                                                                                                                          | 83.     |
| Produced—the word "produced" after the statement of a witness is not sufficient evidence that an "information" was produced:—see Ong How vs. Abdulraman.  Promissory Note on demand—words "with interest &c." on top of                                                                                                                                         |         |
| note:—see Halleemah vs. Noordin.                                                                                                                                                                                                                                                                                                                                | ,       |
| Question of Costs in Appeal cases                                                                                                                                                                                                                                                                                                                               | 445,    |
| Real Estate—owners to devise within the rule against perpetuity                                                                                                                                                                                                                                                                                                 | 86,426. |
| Recorders of Singapore styled Chief Justice S. S.; and Penang, Judge                                                                                                                                                                                                                                                                                            | 400     |
| of Penang                                                                                                                                                                                                                                                                                                                                                       | 420.    |
| roof or external wall of a house, built before the coming into operation of the Conservancy Act XIV of 1856, unless such house "is contiguous to or adjoining any other building," altho' such roof or wall is put up or erected after the Act came into operation. A detached but and building might be suffered, not only to stand as they were but to be re- |         |
| paired so long as such repairs did not amount virtually to a renewal of the structure until they fell to pieces                                                                                                                                                                                                                                                 | 240,    |
| ommitted murder on a foreign territory, an order of the Government under Act 1 of 1849 must first be obtained before the Court could take a judicial notice, otherwise the                                                                                                                                                                                      |         |
| enquiry will be illegal                                                                                                                                                                                                                                                                                                                                         | 147.    |
| prisoner as a witness against him although he consents to it. A woman who is simply a mistress of the prisoner can be called as a witness without any consent on his part.                                                                                                                                                                                      | 348.    |
| ,, vs. O. and F.—The prisoners were convicted of embezzle-<br>ment, but before sentence the counsel for the prisoners<br>moved for an arrest of judgment, on the ground that the                                                                                                                                                                                | 0401    |
| Act under which they had been tried had been repealed:—<br>HELD, that the Act XIII of 1850 upon which they were<br>convicted was still in force in the Straits and that the words<br>"British India" in the Act XVII of 1862 which repealed                                                                                                                     | •       |
| the said Act did not include the Straits Settlements and the                                                                                                                                                                                                                                                                                                    |         |
| conviction was affirmed                                                                                                                                                                                                                                                                                                                                         | 439.    |
| , vs. Song Sam:—The words "found therein" in the Gambling Act, apply to a person who is arrested some distance from the place of gambling, if he is seen going out of such                                                                                                                                                                                      |         |

| •                                                                                                                       | -        |
|-------------------------------------------------------------------------------------------------------------------------|----------|
| place. The Police have no authority to search and seize                                                                 | page.    |
| moneys found in a house where gambling is carried on,                                                                   |          |
| otherwise than the moneys found in the room or place where                                                              |          |
| the gambling was carried on. Accordingly where all the                                                                  |          |
| money in the house was seized by the Police and the Magis-                                                              |          |
| trate ordered the same to be forfeited, the Court quashed                                                               |          |
| the order. The words "reasonably suspected to have been                                                                 |          |
| used or intended to be used," mean such money only as ap-                                                               |          |
| peared to have been used or to have been destined to be                                                                 |          |
| used for gambling then and there at the sitting, i. e., not                                                             |          |
| money which might afterwards be intended, but which had                                                                 |          |
| then and there been intended                                                                                            | 199.     |
| Reg. vs. WillansThe Law of England in Penang, Malacca and                                                               |          |
| Singapore                                                                                                               | 66.      |
| Registrars of Penang and Singapore, and their Senior Sworn Clerks,                                                      |          |
| appointed ex Officio Commissioners to take acknowledg-                                                                  |          |
| 11                                                                                                                      | 260,428. |
| Repealed Act-contracts under it before it was repealed :- see The                                                       |          |
| Attorney General vs. Kam Kong Gay.                                                                                      |          |
| Restitution of conjugal rights by a Chinese wife-no jurisdiction:-                                                      |          |
| see Lim Chye Peow vs. Wee Boon Tek. By a Hindoo wife :-                                                                 |          |
| see Veeramah vs. Sawmy.                                                                                                 |          |
| Rozells vs. Che Dean.—An action for slander is not maintainable                                                         |          |
| without proof of special damage                                                                                         | . 271.   |
| Sahrip vs. Mitchell.—Act XVI of 1839 s. 12—prescription—reason-                                                         |          |
| ableness of custom—effect of Charter                                                                                    | 466.     |
| Sally Sassoon vs. Wingrove.—A mortgage for a term of years does                                                         |          |
| not require a lease for a year to support it. A mortgage to                                                             |          |
| be good need not be registered, as the Regulations as to re-                                                            |          |
| gistration is illegal (Stat. 53 Geo. 3. c. 155). If land mort-                                                          |          |
| gaged be taken in execution by the Sheriff, the Mortgagee has a right to eject the purchaser from the Sheriff from such |          |
| land and to recover its profits during the period of its un-                                                            |          |
| lawful occupation                                                                                                       | 388.     |
| Salvage—goods captured from a pirate:—see In re the Brig "Freak."                                                       | 000.     |
| fittis a cut an amedition for the sale number of magneting                                                              | 1        |
| lost property—compensation:—see Brown and ors. vs.                                                                      |          |
| Duncan.                                                                                                                 |          |
| locality of agreement hotween solvers and nersons who fit                                                               |          |
| out an expedition for the sole purpose of recovering lost pro-                                                          |          |
| perty:—see Brown and ors. vs. Hay.                                                                                      |          |
| owner of vessel not liable to pay an extravagant claim :-                                                               |          |
| see " Augustine Grainger."                                                                                              |          |
| Sandilands Buttery and ors. vs. The Municipal Commissioner.—The                                                         |          |
| limitation of three months, within which an action must be                                                              |          |
| brought, as is required by the Indian Act 14 of 1856 (commonly called the Conservancy Act) applies only when the        |          |
| act or thing complained of, but not when it continues                                                                   | 309.     |
| Schmidt and ors, vs. Snahn.—An agreement not to establish a per-                                                        |          |
| son's self in "Penang or Singapore or to enter into any<br>other business existing in those places as clerk or partner  |          |
| other business existing in those places as clerk or partner                                                             |          |
| within two years without the special consent of the plain-                                                              |          |
|                                                                                                                         |          |

page: tiffs," is reasonable and good and not void as being not general and extensive. The words "any other business," bearing in mind what the parties to the contract are and what are the surrounding circumstances, mean such business as both parties are, or intend to be engaged in. infant enters into a contract abroad the law (as to majority) of the country where the contract was made, must govern the contract, and what that law is, must be given in evi-229.dence as a fact ... Seree or betel leaf-breach of Regulation 23,448. Servant leaving service without notice :- see Miang vs. Kugleman. Shatomah vs. Cauder Meydin.-A Mahomedan married woman whose husband was absent executed a Deed of Conveyance to the plaintiff without obtaining his assent; nor were the requisite formalities required by Act XXXI of 1854 as to married women complied with. She having died, the hushand took administration to her estate and ejected the plaintiff from the land ` 275. Shipowner's lien on goods for freight unpaid: -see Boustead and ors. vs. Clarke. or master does not lose his lien for freight unpaid, although credit is allowed at a fixed and distant day for payment :see Guthrie and anr. vs. McKie. Shipping order-A person signing without the word "Agent" is himself liable through his principal's default:—see Frederick and ors. vs. Dunlop. Singapore and Malacca made over to the East India Company 110. 87. united to Penang • • • 71. Slave dealing in Penang ... ... by a British subject in a foreign territory :- see Reg. vs. Baboo. Slander-without proof of special damage :- see Rozells vs. Che Dean. Song Sam vs. The Municipal Commissioners.—The Police have no authority to search and seize moneys found in a house where gambling is carried on, otherwise than the moneys found in the room or place where the gambling was carried on. In an action for money had and received, it is no defence to say that defendant paid away the money before he was called upon to refund it, unless he received the money merely as an agent for a third party and has made such payment to that third party. The plaintiff having been fined by the Magistrate for gambling and all moneys seized in the gambling house having been ordered to be forfeited and paid to the defendants, the plaintiff had such order quashed and sometime thereafter brought an action against the defendants for money had and received. HELD that the limitations given by the Conservancy Act ran from the time of the receipt of the money by the defendants and not from the time the order of the Magistrate was quashed, as the action could have been brought before the

quashing of the order and the Court could have examined

page. into the validity of such order, as the Magistrate who made such order was not a party to the action ... ... 211 Specific performance—ambiguity in note or memo of sale-extrinsic evidence-part payment :-- see Jemadar Salitu vs. Verta-- shellum. ("CONTRACT" omitted.) Statutes-rule for the construction of :- see Reg. vs. O. and F. Summons against a company or firm-name of a partner necessary to legalize proceedings ... 349. Sved Noor and anr. 'vs. Green .- In an agreement where plaintiff undertook to build a house for defendant for a specified sum and received an advance before the work is commenced but afterwards broke the contract owing to defendant's refusal to make further advances. An action could not be maintained upon the contract-plaintiff sued defendant for what he is entitled to, the Court assumed that from the act of the defendant in the transaction a promise to pay was to be 196. inferred and allowed the plaintiff only his actual claim Tan Boon Soo vs. Choa En Seng and anr .- Legacies to males and females are all liable to abate alike and in proportion to the amount of their respective legacies, if the assets are insufficient for the payment of all in full. An Executor has not the option, as in the case of debts of equal degree, to give one legatee a preference over another, unless the testator's intention to give such 'preference, appears clearly from the will. Legacies which are in their nature general are not entitled to any exemption from abatement on the ground of their being applied to any particular object or purpose. If an Executor voluntarily pays a legacy in full, and afterwards it is necessary for all the legacies to abate, he will be liable to the unpaid legatees to make up the amount which he has paid in excess of what such legatee was justly entitled to. and an excuse that such payments were made under an impression (which was wrong,) that the testator had shewn a preference to the so paid legatees, will not assist them, as they should not have acted upon it without the previous sanction of the Court, whose direction in such cases ought always to be sought and would readily be afforded. The legatees who have been paid in full without any claim to a preference are, in the event of the Executor's insolvency, liable to be called upon by the unsatisfied legatees to refund each the amount which he has received in excess of what he was justly entitled to, had a fair distribution of the 406. actual fund been made ...

Tan Toh Lee vs. Hat.—Although the Gambling Act XIII, of 1870 is very strict, still there cannot be a conviction under it for keeping a gambling house unless proof of guilty knowledge is given. Where the Magistrate convicted the appellant on such a charge without proof of such knowledge, and the appellant appealed, the Court refused to quash the convic-

|                                                                                                                                                                               | /     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| tion, but sent the case back to the Magistrate for such                                                                                                                       | page. |
| proof                                                                                                                                                                         | 356.  |
| Thompson vs. Puan Toh.—The Court will not grant a new trial simply on the ground that Counsel had not called witnesses whom his client wished to be examined first, as the    | i.    |
| Counsel must be allowed his discretion, (unless he has acted contrary to his client's express instructions, which must be proved in the clearest manner,) and secondly, as by |       |
| granting a new trial, it will simply be opening a door to fraud and perjury                                                                                                   | 374.  |
| Transfer of Straits Settlements to the Colonial Office                                                                                                                        | 420,  |
| Trespass—breach of neutrality—order of Government:—see Ab Dorahim vs. Newbold.                                                                                                |       |
| if the plaintiff has not entered on the premises:—see Khouse Miah Malim vs. Anamaleh Chetty.                                                                                  |       |
| breaking 5 feet pathway                                                                                                                                                       | 54.   |
| Commissioners.  Use and Occupation of lands situate abroad—rent:—see Pia Cheral Buri vs. Syed Abbass.                                                                         |       |
| , contract—trespass—entry requisite:—see Khouse Miah Malim vs. Anamaleh Chetty.                                                                                               |       |
| Veeramah vs. Sawmy.—The Court has no jurisdiction on its Eccle-                                                                                                               |       |
| siastical side to entertain suits for the restitution of conjugal                                                                                                             |       |
| rights of Hindoos                                                                                                                                                             | 421.  |
| Volunteer—defective assignment of realty:—see Shatomah vs. Kader Meydin.                                                                                                      |       |
| Vadamalia Pillay vs. Shetthay Amah.—The Court has no jurisdic-                                                                                                                |       |
| tion on its Civil side to entertain suits for restitution of con-                                                                                                             |       |
| jugal rights amongst Hindoos Vendor's lien—how lost—disclaimer;—see Caunter vs. Brown & ors.                                                                                  | 270.  |
| Vellayadan vs. Wilson.—An employer is not justified in taking the                                                                                                             |       |
| law upon himself as to flog and imprison an agricultural la-                                                                                                                  |       |
| bourer for absenting from his work without leave. A father                                                                                                                    |       |
| may inflict corporal punishment on his child, so likewise a                                                                                                                   |       |
| schoolmaster on his scholar, and a tradesmsn or master<br>standing in loco parentis on his apprentice, moderately in                                                          |       |
| the way of correction                                                                                                                                                         | 123.  |
| Velloo Pullay vs. Kadier and anr.—The refusal of a Magistrate to ad-                                                                                                          |       |
| journ a case on account of the absence of counsel, is no ground for an appeal, although the party, who asked for                                                              |       |
| such adjournment, loses his case                                                                                                                                              | 277.  |
| Verrapa Chetty vs. Ventre.—Action on Bottomry Bond against de-<br>fendant as surety—loss of ship through ignorance of the                                                     |       |
| master and drifting by tide.—Held, no deviation as it was                                                                                                                     |       |
| not a voluntary act. SEMBLE—The law of the Flag                                                                                                                               |       |
| (French) must prevail in all questions of seaworthiness                                                                                                                       | 261.  |
| Vessel and arms—seizure and detention—suspicion of piracy— illioit chandoo;—see Lim Bee vs. Jadee.                                                                            | ,     |

| •                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 20.0.00 |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| Warne vs. Gaudart.—The Court of Requests has jurisdiction to try a case where the amount claimed is within its jurisdiction, although such amount be the balance of an amount of greater extent. The words "matter in dispute." in the Charter and Proclamations relating to the Court of Requests, mean the thing claimed and denied, and not any thing which may come incidentally in question; and has no application at all to the "debts" which may come in ques- | page,   |
| tion, but applies only to the unspecified class of cases of small amount to which the power of the Court extends                                                                                                                                                                                                                                                                                                                                                       | 11.     |
| Warrant for an offence committed in a foreign country—jurisdic-                                                                                                                                                                                                                                                                                                                                                                                                        |         |
| tion;—see Ho Ghee Sew vs. Nakodah Mahomed.                                                                                                                                                                                                                                                                                                                                                                                                                             |         |
| Widow's right to administration to intestate's estate:—see In the Goods of Abdullah; and Khoo Chow Sew.                                                                                                                                                                                                                                                                                                                                                                | ,       |
| Wife cannot be a witness for or against her husband in a criminal case;see Reg. vs. Lim Ah Weng.                                                                                                                                                                                                                                                                                                                                                                       |         |
| Will—Act 25 of 1838—what a sufficient execution;—see In the Goods of Galastaun.                                                                                                                                                                                                                                                                                                                                                                                        |         |
| attactation mamagamittan be south as with an halding to                                                                                                                                                                                                                                                                                                                                                                                                                |         |
| of pen (English case)                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 593.    |
| ,, attestation—omission of signature—1 Vic. c. 26, s. 9. (Eng-                                                                                                                                                                                                                                                                                                                                                                                                         |         |
| lish case)                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 594.    |
| ,, construction—gifts of residue to Executors whether absolute or in trust—Gifts void for uncertainty—perpetuity—                                                                                                                                                                                                                                                                                                                                                      |         |
| power of appeal to Privy Council                                                                                                                                                                                                                                                                                                                                                                                                                                       | 569.    |
| onstruction—insufficiency of assets—abatement—preference—executors liability to pay unpaid legatees:—see Tan Boon Soo vs. Choa En Seng.                                                                                                                                                                                                                                                                                                                                |         |
| gifts to Executors in trust—marriage—divorce—legatees— 24 shares—died without issue in testator's lifetime—forbid-                                                                                                                                                                                                                                                                                                                                                     |         |
| ding legatees to go to law for their shares—whahkoff land—charity—kandoories or feasts to testator and the prophets—perpetuity—residue:—see Fatimah vs. Logan.                                                                                                                                                                                                                                                                                                         |         |
| ,, legatees—marriage—presumption—custom—trustees—trust<br>not declared—beneficial estate—restraint on alienation—                                                                                                                                                                                                                                                                                                                                                      |         |
| power to lease—direction to lend money—power to renew same—family burying place—Sow Chong house—perpetui-                                                                                                                                                                                                                                                                                                                                                              |         |
| ty:—see Ong Cheng Neo vs. Yeap Cheah Neo.  Probate—Administration revoked—will supposed not to exist:—see In the Goods of Abdullah.                                                                                                                                                                                                                                                                                                                                    |         |
| , Probate to copy—original being lost:—see In the Goods of Shaik Emam.                                                                                                                                                                                                                                                                                                                                                                                                 |         |
| ,, Sinchew is not a charity : see Choa Cheow Neo vs. Spottis woode.                                                                                                                                                                                                                                                                                                                                                                                                    |         |
| Witness:-see Appeal; and Reg. vs. Lim Ah Weng.                                                                                                                                                                                                                                                                                                                                                                                                                         |         |
| Writ of Sequestration—action arose abroad—defendant abroad—jurisdiction:—see Khu Poh vs. Wan Mat.                                                                                                                                                                                                                                                                                                                                                                      |         |
| of Sequestration—goods in custodia legis :—see Baumgarten vs. Kraal.                                                                                                                                                                                                                                                                                                                                                                                                   |         |

| Indian Law Reports.                                                                            |              |
|------------------------------------------------------------------------------------------------|--------------|
|                                                                                                | page.        |
| Abetment of false personation                                                                  | 549,         |
| ,, of giving false evidence—jurisdiction:—see Andy Chetty.                                     |              |
| ,, of extortion:—see Queen vs. Meajan and anr.                                                 | ,            |
| ,, 'omission to give information :—see Q. vs. Khadin Sheikh.                                   |              |
| Absence of prosecutor:—see Q. vs. Bedoor, Ghose.                                               |              |
| Accomplice—evidence:—see Q. vs. Dwarka.                                                        |              |
| Act XIII of 1859 does not apply to domestic servants, but to artificers, workmen, or labourers | 527.         |
| Acts done by a British subject out of British Territories: see Q.                              | 54(.         |
| vs. Moulvie Ahmudoollah.                                                                       |              |
| Amends-theft:-see Q. vs. Gogun Sein and ors.                                                   |              |
| ,, proof of pecuniary loss to prosecutor                                                       | 539.         |
| Andy Chetty.—The prisoner asked a witness to suppress certain facts                            | oọo.         |
| in giving his evidence against the prisoner before the Depu-                                   |              |
| ty Mugistrate on a charge of defamation :- HELD that this                                      |              |
| was abetment of giving false evidence in a stage of a judicial                                 |              |
| proceeding and was triable before Court of Session only                                        | 521.         |
| Animal-negligence with respect to :- see Q. vs. Brojonarain Pubraj.                            |              |
| Appeals remaining undecided—further evidence required                                          | 545.         |
| Bigamy:—see Q. vs. Enai Beebee.                                                                |              |
| Breach of Contract:—see Sadoo Churn Pal.                                                       |              |
| ,, ,, Coolies refusing to work:—see Q. vs. Gaub Gorah Cacharce and ors.                        |              |
| ,, ,, ,, advances worked off:—see Lyall and Co. vs. Bhaboo Sheikh.                             | •            |
| Breach of Trust-framing charge of                                                              | 535.         |
| ,, ,, see Misappropriation.                                                                    |              |
| Charges under the Penal Code                                                                   | 550.         |
| Charge, each head of, to be complete in itself                                                 | <b>54</b> 3. |
| Cheating, what amounts to :- see Q. vs. Meajan and anr.                                        |              |
| Breach of contract : see Sadoo Churn Pal.                                                      |              |
| Child, competent or incompetent to give evidence                                               | 547.         |
| Commitment, annulment of—compromise:—see Q. vs. Salin Sheikh.                                  |              |
| Compromise after a case had been committed to the Sessions:-see                                |              |
| · Q vs. Salin Sheikh.                                                                          | 4            |
| Compounding Offences                                                                           | 533,535.     |
| Compensation to prosecutor—proof of pecuniary loss                                             | 539.         |
| Contempt:—see Q. vs. Rattun Sahoo.                                                             | 1            |
| Conviction and sentence on several charges:—see Q. vs. Azgur.                                  |              |
| ,, under two Sections of the Penal-Code : see Q. vs. Bhoobun                                   |              |
| Mohun and two ors.                                                                             |              |
| ,, former—construction of Section 75 of the Penal Code :—see                                   | _ ^          |
| Q. vs. Harpaul. ,, under two Sections of the Penal Code of offences committed                  | *I.          |
| at the same time                                                                               | 539.         |
| after a previous offence—reference to Sec. 75, P. C                                            | 550.         |

| Criminal Misappropriation :- see Q. vs. Bissessur Roy.                 | page.       |
|------------------------------------------------------------------------|-------------|
| Criminal Trespass                                                      | 498.        |
| Criminal Trespass                                                      | 500.        |
| Deposition taken in a former trial used against a prisoner in a subse- |             |
| quent trial:—see Q. vs. Bishonath Pal.                                 |             |
| Domestic Servants-Act XIII of 1859 does not apply to them              | 527.        |
| Dying depositions without proof of belief of approaching death         | 538.        |
| Evidence given in a former trial:—see Deposition.                      |             |
| ,, of an accomplice:—see Q. vs. Dwarka.                                |             |
| Extortion, what amounts to :- see Q. vs. Meajan and anr.               |             |
| False Charge :- see Raffee Mahomed vs. Abbass Khan, and see Na-        |             |
| boodeep Chundar Sirkar.                                                |             |
| ,, ,, need not be made before a Magistrate:—see Q. vs.                 |             |
| Subbana Gaundan and ors.                                               |             |
| ", ", framing of                                                       | 534.        |
| need not have been made in Court                                       | 545.        |
| ,, Evidence—trial of several prisoners together :- see Q. vs. Kur-     |             |
| reem & anr.                                                            |             |
| ,, ,, framing of charge of                                             | 538,540.    |
| ,, Personation and abetment thereof—framing of Charges of              | 549.        |
| Filthy premises :- see Q. vs. Brojo Lall Mitter.                       |             |
| Finding and sentence in case of doubt of which of several charges      |             |
| the accused is guilty                                                  | 536.        |
| Fine—recovery—on death of offender                                     | 541.        |
| ,, default of payment—imprisonment                                     | 545.        |
| Fines inflicted for offences punishable under other Laws than the      |             |
| Penal Code                                                             | 541.        |
| Forfeiture of recognizance:—see Kalikant Roy Chowdhry.                 |             |
| Forgery-alteration of a Police Diary : see Q. vs. Rughoo Barrick.      |             |
| " framing of charge of                                                 | 540.        |
| Gang-robbery with grievous hurt                                        | 536.        |
| Gratification :- see In re Abdool & anr.                               |             |
| Grievous hurt, framing of charge of                                    | 540.        |
| 1 . The forming of charges of                                          |             |
|                                                                        | 548.        |
| 1                                                                      | 545.        |
| Infant child, framing of charge of secret burial of                    | 547.        |
| In re Abdool and anrAny officer of the High Court who asks or          |             |
| accepts a present from any person in whose favour judgment             |             |
| is pronounced by the Court, is guilty of a gross breach of             |             |
| duty and a contempt of Court. So also any person who                   |             |
| offers or gives such present is guilty of a contempt of Court.         | 493.        |
| Kalikant Roy Chowdhry.—There must be a regular judicial trial and      |             |
| legal inquiry before an order to forfeit recognizances can be          |             |
| passed and the evidence taken should be recorded in the                |             |
| presence of the accused or in the presence of an agent of the          |             |
| accused duly authorized to appear in such inquiry                      | 512.        |
| Kapalavaya Saraya.—A settlement of accounts in writing, though         |             |
| not signed by any person, is a "valuable security" within              |             |
| the definition of Section 30 of the Indian Penal Code                  | <b>520.</b> |

| The state of the s | age.          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| Kidnapping a minor, framing of charge of                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 548.          |
| and theft from a child:—see Q. vs. Shama Sheikh.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |               |
| ,, from lawful guardianship:—see Q. vs. Gunder Sigh, and Q. vs. Gooroodoss Rajbunsee.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |               |
| Lyall and Co. vs. Bhaloo Sheikh.—Act XIII of 1859 relates to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |               |
| fraudulent breaches of contract, and does not apply where                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |               |
| an advance has not only been worked off by a labourer,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 525.          |
| Magistrate not bound to file any document alluded to in his grounds                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 5 <b>43</b> . |
| Mahomedan law between Nikai wives and others 533,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 536.          |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 547.          |
| Married woman taken for illicit intercourse :- see Q, vs. Kumara-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |               |
| sami.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |               |
| Misappropriation :- see Q. vs. Bissessur Roy.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |               |
| Mischief:—see Q. vs. Denoo Bundhoo Biswas & ors.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 539.          |
| Naboodeep Chunder Sirkar.—Sec. 211 of the Penal Code applies not                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |               |
| only to a private individual but also to a Police Officer who                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 499.          |
| Negligence with respect to animal:—see Q. vs. Brojonarain Pubraj.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |               |
| Nuisancefilthy premises :- see Q. vs. Brojo Lall Mitter.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |               |
| Offences committed by a subject of the Queen out of British Territo-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |               |
| ries:—see Q. vs. Moulvie Ahmudoollah.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |               |
| Omission to inform Police when an offence had been committed:-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |               |
| see Q. vs. Khadim Sheikh.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |               |
| Order by a Public Servant: see Q. vs. Ramtonoo Singh.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |               |
| Penal Code Charges                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 550.          |
| Police Officer's Diary-forgery :- see Q. vs. Rughoo Barrick.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |               |
| ,, statements recorded by a 537,541,8                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 543.          |
| Prosecutor—absence of—case ought not to be dismissed:—see Q. vs                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |               |
| Bedoor Ghose.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 534.          |
| Queen vs. Amer Daraz and anrWrongful Confinement of an ab-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |               |
| ducted woman. The prisoners were convicted of wrongful                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |               |
| confinement of a woman, the facts of the case showing that                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |               |
| she never went willingly to the house of the prisoners, and                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 17.0          |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | ₹76.          |
| ,, vs. Amarut Sheikh.—On a charge of Theft. In order to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |               |
| legalize whipping in addition to imprisonment in the case of a second-conviction, the offence must be the same in both                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 186.          |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 100.          |
| ,, vs. Azgur and ors.—Conviction and sentence both for rioting and for grievous hurt upheld, the punishment being on the                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |               |
| whole not more severe than might properly have been                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |               |
| awarded if the conviction had been for grievous hurt only.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |               |
| A person convicted of rioting should not be convicted of hurt                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |               |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 90.           |
| 0                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |               |

|       |                                                                                                                                                                                                                                             | page.        |
|-------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| Queen | vs. Bedoor Ghose.—A Magistrate has no power to dismiss in default of prosecution a charge laid under Section 347 of the                                                                                                                     |              |
| r     | Penal Code of Wrongful Confinement for the purpose of ex-<br>torting money. Where the evidence of a prosecutor and his<br>witnesses is taken in the presence of the accused, and the                                                        |              |
|       | case is postponed by the Court for the evidence of witnesses<br>for the defence, the case ought not to be dismissed for de-<br>fault of prosecution if, on the day to which it has been post-                                               |              |
|       | poned, the prosecutor is not present                                                                                                                                                                                                        | 510.         |
| 71    | vs. Bhoobun Mohun and ors.—Where a conviction has been had under two Sections of the Penal Code, in one of which only an alternative sentence of imprisonment or fine is al-                                                                |              |
|       | lowed, a sentence of fine cannot be passed                                                                                                                                                                                                  | 504.         |
| ור    | vs. Bishonath Pal.—The irregularity and injustice of using against a prisoner in a subsequent trial the deposition of witnesses given in a previous case commented on, and the proper course which should be followed in corroborating evi- |              |
|       | dence under Section 31 Act II of 1855 pointed out                                                                                                                                                                                           | 528.         |
| ,,    | vs. Bissessur Roy.—A servant who retains in his hands money which he was authorized to collect, and which he did collect,                                                                                                                   |              |
|       | from the debtor of his master, because money is due to him as wages, is guilty of criminal misappropriation                                                                                                                                 | 506.         |
| 71    | vs. Broje Lall Mitter: - The occupier who suffers the land to                                                                                                                                                                               | E04          |
| 79.9  | be in a filthy state, is the person liable for penalty  vs. Brojonarain Pubraj.—A conviction under Section 289 of the Bonel Code graphed in an arrest and additional districts.                                                             | 524.         |
|       | the Penal Code quashed, in-as-much as evidence did not allude to the negligence of which the accused has been found guilty, and because the evidence was not taken in the pre-                                                              | 470          |
|       | vs. Denoo Bundhoo Biswas and ors.—Before a conviction can                                                                                                                                                                                   | 472.         |
| ***   | be had for mischief under Section 425 of the Penal Code, it must be proved that the accused intended to cause, or knew                                                                                                                      |              |
|       | that he was likely to cause wrongful loss                                                                                                                                                                                                   | 507.         |
| ור    | vs. Dwarka.—The testimony of an accomplice is not alone suf-<br>ficient for a conviction. The corroboration must be on mat-<br>ters directly connecting the prisoner with the offence of                                                    |              |
|       | which he is accused; and the evidence of two or more ac-                                                                                                                                                                                    |              |
|       | complices requires confirmation equally with the testimony                                                                                                                                                                                  | 492.         |
|       | vs. Enai Beebee.—The Court held that a woman, who does                                                                                                                                                                                      | 2021         |
| ,,    | not use all reasonable means in her power to inform herself<br>of the fact of her first husband's alledged demise, and con-                                                                                                                 |              |
|       | tracts a second marriage within sixteen months after cohabitation with her first husband, without disclosing the fact                                                                                                                       |              |
|       | of the former marriage to her second husband, is liable to                                                                                                                                                                                  |              |
|       | enhanced punishment under section 495 of the Penal Code                                                                                                                                                                                     | 487.         |
| 11    | vs. Gaub Gorah Cacharee and ors.—Coolies who have received advances in contemplation of work to be done, may be proceeded against under Act 13 of 1859                                                                                      | <b>524</b> . |
|       | Production and and and and and and and and and an                                                                                                                                                                                           | -            |

| Queen    | vs. Gogun Sein and ors.—Amends cannot be awarded for a                                                             | page. |
|----------|--------------------------------------------------------------------------------------------------------------------|-------|
| <b>V</b> | false charge of theft                                                                                              | 474.  |
|          | vs. Gooroodoss Rajbunsee A person in carrying off, without                                                         | 21 21 |
| ,,       | the consent of her lawful guardian, a girl to whom he was                                                          |       |
|          | betrothed by her father, who, after permitting her to reside                                                       |       |
|          | occasionally in his house, suddenly changed his mind and                                                           |       |
|          | broke off the marriage, is guilty of kidnapping from lawful                                                        |       |
|          | guardianship,                                                                                                      | 481.  |
| 4.       | vs. Gunder Sigh.—To bring a case under Section 361 of the                                                          | 2011  |
| ",       | Penal Code, there must be a taking or enticing of a child out                                                      |       |
|          | of the keeping of the lawful guardian without his consent                                                          | 480.  |
|          | vs. Hurpaul.—Previous Convictions—Construction of Section                                                          | 2007  |
| ,,       | 75. Penal Code:—Held that Section 75 of the Penal Code                                                             |       |
|          | only applies to convictions of offences committed after                                                            |       |
|          | the Code came into operation                                                                                       | 482.  |
|          | •                                                                                                                  | ±02.  |
| ••       | vs. Khadim Sheikh.—An Omission to inform Police that a crime has been committed does not, under Section 107 of the |       |
|          | Penal Code, amount to abetment, unless such omission in-                                                           |       |
|          | volves a breach of a legal obligation. A private individual                                                        |       |
|          |                                                                                                                    |       |
|          | is not bound by any law to give information of any offence                                                         | 400   |
|          | which he has seen committed                                                                                        | 488.  |
| ,,       | vs. Kureem and anr.—The commitment and trial together of                                                           |       |
|          | several persons who are charged with having given false                                                            |       |
|          | evidence in the same proceedings, should be avoided. A                                                             |       |
|          | Court of Session is competent to try separately prisoners                                                          |       |
|          | who have been committed together                                                                                   | 502.  |
| ,,       | vs. Kumarasami.—Upon an indictment under Section 498 of                                                            |       |
|          | the Penal Code charging that the prisoner took away one A.                                                         |       |
|          | who was then and whom he then knew to be the wife of one                                                           |       |
|          | M. with the intent that he might have illicit intercourse                                                          |       |
|          | with the said A HELD, that there was a taking within the                                                           |       |
|          | meaning of the Section although the advances and solicita-                                                         | •     |
|          | tions had proceeded from the woman and the prisoner had                                                            |       |
|          | for some time refused to yield to her request                                                                      | 521.  |
| 11       | vs. Meajan and anr.—To amount to the offence of extortion,                                                         |       |
|          | property must be obtained by intentionally putting a person                                                        |       |
|          | in fear of injury to that person and thereby dishonestly in-                                                       |       |
|          | ducing him to part with his property. The mere issue of a                                                          |       |
|          | Hookumnamah (to collect statistical information) by a Po-                                                          |       |
|          | lice Officer, is no legal ground for a conviction of abetment                                                      |       |
|          | of cheating or of extortion                                                                                        | 478.  |
| ,,       | vs. Moulvie Ahmudoollah.—A person who is admittedly a sub-                                                         |       |
|          | ject of the British Government is liable to be tried by the                                                        |       |
|          | Courts of this country for acts done by him whether wholly                                                         |       |
|          | within or wholly without, or partly within and partly with-                                                        |       |
|          | out, the British Territories in India, provided they amount                                                        |       |
|          | together to an offence under the Penal Code                                                                        | 474.  |
| ,,       | vs. Nittar Mundle.—The tearing up of a pottah is the destruc-                                                      |       |
|          | tion of a valuable security within the meaning of Section                                                          |       |
|          | 477 of the Penal Code                                                                                              | 476.  |

| 1                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | page.         |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| Queen vs. Ramtonoo Singh.—Before a conviction can be had under<br>Section 188 Penal Code, it must be proved that the accused<br>knew that an order-had been promulgated by a public ser-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | pusc.         |
| vant directing such accused person to abstain from a certain act                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 512.          |
| by a Head Constable was held to fall under Section 471 Penal Code, as the forgery of a document made by a pub-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |               |
| lic servant in his official capacity                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 504.          |
| Procedure if a Court before which the offence of contempt<br>under Section 179 Penal Code is committed, considers that<br>a sentence of imprisonment is called for, it should record a<br>statement of the facts constituting the contempt and the<br>statement of the accused, and forward the case to a Ma-                                                                                                                                                                                                                                                                                                                                                                                                                                                                |               |
| gistrate                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 505.          |
| to the Sessions cannot be annulled by his allowing the prosecutor to file a compromise                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 473.          |
| vs. Shama Sheikh.—The offence described in Section 363 of the Penal Code is included in that described in Section 369, the kidnapping and the intention of dishonestly taking property from the kidnapped child being included in the                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 4(3.          |
| latter Section                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 497.          |
| night belonging to two different persons from the same room of a house, it was held that he could not be sentenced separately as for two offences of theft                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 503.          |
| ", vs. Subbana Gaundan and ors.—To constitute the offence of preferring a false charge, under Section 211 of the Penal Code, the charge need not be made before a Magistrate.  Nor need the charge have been fully heard and dismissed: it is enough if it is not pending at the time of the trial                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 51 <b>9</b> . |
| or occupier of land on which an unlawful assembly is held, cannot be convicted under Section 154 of the Penal Code, unless there is a finding that the riot was premeditated. Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly and to try them together, in-as-much as they do not have "one common object" within the meaning of Section 141 of the Penal Code. The right of an accused party to cross-examine witnesses is limited to a right to cross-examine the witnesses for the prosecutor or for the Crown called against him. If he wishes to avail himself of evidence which has been given, or which can be given, by a witness called for another of the parties accused, he must call him |               |
| as his own witness                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 514.          |

|                                                                      | page. |
|----------------------------------------------------------------------|-------|
| Raffee Mahomed vs. Abbas Khan.—Sections 182 and 211 of the Pe-       | 1 0   |
| nal Code distinguished. The latter held to apply to a case           |       |
| of false charge in which the accused in the present case had         |       |
| appeared before the Police and charged the now complain-             |       |
| ant with having caused the death of the accused's child              |       |
| by poisoning                                                         | 497.  |
| Receiving stolen property, charge to set forth knowledge or belief   | 544.  |
| Recognizance—forfeiture—procedure,—see Kalikant Roy Chowdhry.        |       |
| Riot-conviction and sentence on several charges: see Q. vs. Azgur    |       |
| and ors.                                                             |       |
| ,, unlawful assembly—liability of owner of land :—see Q. vs.         |       |
| Surroop Chunder Paul and anr                                         | 514.  |
| Rioting with deadly weapons and grievous hurt—charges                | 548.  |
| Sadoo Churn Pal.—Case in which the majority of the Court held that   |       |
| it was one of Breach of contract, while Seton-Karr. J.,              |       |
| was of opinion that the prisoner was rightly convicted of            |       |
| cheating under Sections 415 and 417 of the Penal Code                | 483.  |
| Secret burial of infant child                                        | 547.  |
| Sentence—punishment under 2 Sections of the Penal Code:—see Q.       | 044.  |
| vs. Bhoohun Mohun and ors.                                           |       |
|                                                                      |       |
| State offences—acts done within or without British Territory:—see    |       |
| Q. vs Moulvie Ahmudoollah.                                           |       |
| Theft-amends-illegality of Magistrate's order:—see Q. vs. Gogun      |       |
| Sein and ors.                                                        |       |
| ,, property of two different persons stolen from the same room       |       |
| of a house:—see Q. vs. Sheikh Mooneah.                               |       |
| ,, 'taking property from a kidnapped child:—see Q. vs. Shama Sheikh, |       |
| ,, framing of charge of                                              | 535.  |
| Unlawful assembly, framing of charge of                              | 544.  |
| ,, ,, charges of grievous hurt and rioting                           | 548.  |
| ,, riot-liability of owner of land :- see Q. vs.                     | -     |
| Surroop Chunder Paul and anr.                                        |       |
| Valuable security—tearing a pottah :—see Q. vs. Nittar Mundle.       |       |
| ,, ,, fraudulent destruction                                         | 537.  |
| ,, ,, settlement of accounts not signed:—see Kapa-                   |       |
| lavaya Saraya.                                                       |       |
| Whipping :- see Q. vs. Amarut Sheikh.                                |       |
| Withdrawals of complaints and compounding offences                   | 533.  |
| Witnesses attending before criminal Courts                           | 546.  |
| Wrongful confinement:—see Q. vs. Amer Daraz:                         |       |
| ,, absence of Prosecutor:—see Q. vs. Bedoor                          |       |
| Ghose.                                                               |       |
| ,, loss:—see Q. vs. Denoo Bundhoo Biswas.                            |       |

THE END.

Printed at the Commercial Press, by Heap Lee & Co., PENANG.

1877.

